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SUPREME COURT, U. S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1962

## No. 41

JOHN THOMAS AVENT, ET AL., PETITIONERS,

*vs.*

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED MAY 4, 1961
CERTIORARI GRANTED JUNE 25, 1962

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

## No. 11

JOHN THOMAS AVENT, ET AL., PETITIONERS,

*vs.*

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 2]

Before Mallard, J., June 30, 1960, Criminal Term, Durham Superior Court, Defendants Appealed.

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## IN THE SUPERIOR COURT OF DURHAM COUNTY, NORTH CAROLINA

State of North Carolina
Durham County:

Be It Remembered that a Superior Court duly and regularly begun and held for the County of Durham, at a time and place required by law, to wit, at the Courthouse in Durham, on the fifteenth Monday after the first Monday in March, 1960, before the Honorable Raymond B. Mallard, Judge, duly commissioned, authorized and empowered to hold said Court. Whereupon the following proceedings were had.

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INDICTMENT—John Thomas Avent:

SUPERIOR COURT

June Criminal Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N.C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its [fol. 3] manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered

by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

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No. 410

STATE

v.

JOHN THOMAS AVENT CM Age 20
Student, Chidley Hall, N.C.C.

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Indictment Various Cases
Trespass....., Pros.

Witnesses:

X W. K. Boger, S. H. Kress

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Lacy Carrole Streeter

SUPERIOR COURT

June Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Lacy Carrole Streeter, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand

nine hundred and 60, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its [fol. 4] manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Lacy Carrole Streeter, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

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No. 485

STATE

v.

LACY CARROLE STREETER (CM)
Age 24 222 NC College

---

Indictment Various Cases
Trespass....., Pros.

Witnesses:

W. K. Boger % H. S. Kress

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found X A True Bill.

G. H. Campbell, Foreman Grand Jury

INDICTMENT—Frank McGill Coleman

SUPERIOR COURT

June Criminal Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Frank McGill Coleman, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N.C., said S. H. Kress [fol. 5] and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Frank McGill Coleman, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 425

STATE

v.

FRANK McGIEL COLEMAN (WM)
Age 22 . 2219 W. Club Blvd.

Indictment Various Cases
Trespass....., Pros.

Witnesses:

W. K. Boger—S. H. Kress
A. P. Lockamy, Officer

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT— SHIRLEY MAE BROWN

SUPERIOR COURT

June Criminal Term, A. D. 1960

State of North Carolina
Durham County

The Jurors for the State upon their oath present, That Shirley Mae Brown, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land [fol. 6] and enement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guest, willfully and

unlawfully refused to do so knowing or having reason to know that he the said Shirley Mae Brown, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

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No. 418

STATE

v.

SHIRLEY MAE BROWN (CF) Age 19
Student—206 Pilot St.

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Indictment Various Cases
Trespass....., Pros.

Witnesses:

X W. K. Boger—S. H. Kress

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found

X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Donovan Phillips

SUPERIOR COURT

June Criminal Term, A. D. 1960.

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Donovan Phillips, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intention-
[fol. 7] ally, after being forbidden to do so, enter upon

the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Donovan Phillips, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

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No. 472

STATE

v.

DONOVAN PHILLIPS (CM) Age 19
22 N. C. College

---

Indictment Various Cases
Trespass....., Pros.

Witnesses:

X W. K. Boger—S. H. Kress
T. B. Seagroves—Officer
C. J. Brown "
E. S. Batten "

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Callis Napolis Brown

SUPERIOR COURT

June Criminal Term, A. D. 1960.

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, that [fol. 8] Callis Napolis Brown, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. H. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Callis Napolis Brown, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation No. 3, infra.

No. 416

STATE

v.

CALLIS NAPOLIS BROWN (CM)
Age 21 Student 206 Pilot St.

Indictment Various Cases
__ pass_____, Pros.

Witnesses:

T. B. Seagroves—Officer
X W. K. Boger—S. H. Kress
Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

INDICTMENT—Joan Harris Nelson

SUPERIOR COURT

June Criminal Term, A.D. 1960

State of North Carolina
Durham County.

The Jurors for the State upon their oath present, That Joan Harris Nelson, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand [fol. 9] nine hundred and sixty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved

for employees and invite[d] guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said Joan Harris Nelson, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Murdock, Solicitor.

See Stipulation #3, infra.

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No. 467

STATE

v.

JOAN HARRIS NELSON WF Age 18
Student—Southgate Dorm. Room 230—Duke Univ.

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Indictment Various Cases
Trespass....., Pros.

Witnesses: X W. K. Boger—S. H. Kress
Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found
X A True Bill.

G. H. Campbell, Foreman Grand Jury.

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EXCEPTION #1:

Defendants except to the Court's ruling in overruling [fol. 10] the following Motion to Quash the Indictments.

---

IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTION TO QUASH INDICTMENT (Shirley Mae Brown)—and Ruling Thereon

Mr. McKissick: Now comes the defendant Shirley Mae Brown, being a Negro citizen of, Durham County and the United States of America, and herein makes the following Motion:

That the Indictment charging this defendant with simple trespass based upon G. S. 14-134 be quashed for the reason that G. S. 14-134 is hereby being unconstitutionally applied to this defendant, on the following grounds:

1. That this defendant, while using the facilities of the S. H. Kress and Company, duly licensed by the City and County of Durham for the purpose of carrying on a business open to the general public, which this defendant is a part of, was charged with trespass, while being in said public place, on account of her race and color, which criminal charge is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process of the laws as set forth in the two constitutional provisions as hereinbefore set forth.

2. And for the further reason that the S. H. Kress and Company has been duly licensed by the City and County of Durham, and said license does not grant the owner of said Company the privilege to discriminate against citizens of the City and County of Durham on account of race and color, and the State, by arresting said defendant under G. S. 14-134, further violated defendant's rights as guaranteed him under the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 17 of the Constitution of the State of North Carolina.

[fol. 11] 3. That the provisions of North Carolina General Statutes 14-134 is unconstitutional in that it is vague and indefinite because the statute itself does not require the possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is a violation of his constitutional rights guaranteed under the due process and equal protection clause, Article I, Section 17 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

4. That the State of North Carolina, by the use of its police power, through an officer of the Durham City Police Department, in arresting this Negro defendant pursuant to North Carolina Statutes, Chapter 14, Section 134, was unconstitutional in that the arrest was a denial of due process and equal protection of the laws guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open to the public, in carrying out possessor's whims and caprices against serving members of the Negro race on the same basis as members of other races, all of whom have been invited to use said establishment, solely on the basis of race and color.

5. That this Negro defendant, who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment, was denied use of said establishment on the same basis as other members of the public, solely because of his race and color, and having been arrested by the State of North Carolina through the Durham Police Department under North Carolina G. S. 14-134 for attempting to exercise his right to equal treat-
[fol. 12] ment as an invitee of S. H. Kress and Company solely because of his race and color was a denial of due process and equal protection of the laws as guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

This 30th day of June, 1960.

Respectfully submitted,

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, W. G. Pearson, II., Counsel for Defendant.

The Court: Motion denied.
Exception: See Stipulation No. 3, infra.

EXCEPTION #1.

EXCEPTION #2:

Defendants except to the Court's ruling in overruling the following Motion to Quash the Indictments.

IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTION TO QUASH INDICTMENT (Joan H. Nelson Trumpower) —and Denial Thereof

Mr. McKissick: Now comes the defendant Joan H. Nelson Trumpower, being a White citizen of Durham County and the United States of America, and herein makes the following Motion:

That the Indictment charging this defendant with simple trespass based on G. S. 14-134 be quashed for the reason that G. S. 14-134 is hereby being unconstitutionally applied to this defendant on the following grounds:

1. That this defendant, while using the facilities of the S. H. Kress and Company, duly licensed by the City and County of Durham and the State of North Carolina for the purpose of carrying on a business open to the general public, which this defendant is a part of, was charged with trespass, while being in said public place, on account of [fol. 13] her association with members of the Negro race, which criminal charge is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process of the laws as set forth in the two constitutional provisions as hereinbefore set forth.

2. And for the further reason that the S. H. Kress and Company has been duly licensed by the City and County of Durham, and said license does not grant the owner of said Company the privilege of discriminating against white citizens of the City and County of Durham on account of association with Negroes, and the State, by arresting said white defendant under G. S. 14-134, further violated defendant's right as guaranteed her under the Fourteenth Amendment to the Constitution of the United States of

America and Article I, Section 17 of the Constitution of the State of North Carolina.

3. That the provisions of North Carolina General Statutes 14-134 is unconstitutional in that it is vague and indefinite, because the statute itself does not require the possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his or her liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is a violation of his constitutional rights guaranteed under the due process and equal protection clause, Article I, Section 19 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the United States Constitution.

4. That the State of North Carolina, by the use of its police power, through an officer of the Durham County Police Department, in arresting this white defendant, who [fol. 14] was associating with Negroes, pursuant to North Carolina General Statutes, Chapter 14, Section 134, was unconstitutional in that the arrest was a denial of due process and equal protection of the laws guaranteed by Article I, Section 17 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open to the public, in carrying out possessor's whims and caprices against serving members of the white race who associated with Negroes on the same basis as members of other races, all of whom have been invited to use said establishment, solely on the basis of the fact that they were associating with Negroes.

5. That this white defendant who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment were denied use of said establishment on the same basis as other members of the public, solely because she was associated with Negroes and having been arrested by the State of North Carolina through the Durham County Police Department under

North Carolina G. S. 14-134 for attempting to exercise her rights to equal treatment as invitee of S. H. Kress and Company solely because she was associating with Negroes, a denial of due process and equal protection of the laws as guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

This the 30th day of June, 1960.

Respectfully submitted,

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, W. G. Pearson, II.

Court: Motion denied.
Exception: See Stipulation No. 4, infra.

EXCEPTION #2.

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[fol. 15]

IN THE SUPERIOR COURT OF DURHAM COUNTY

PLEA, JURY AND VERDICT

John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Donovan Phillips, and Lacy Carrole Streeter, by and through their attorneys F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson, enter a plea of Not Guilty in each case. The cases were consolidated for the purpose of trial.

These cases were called at the June 27, 1960, Term for the purpose of trial and the defendants pleaded Not Guilty as charged in the Bills of Indictment, and thereupon a Jury was properly sworn and impaneled.

On the first day of July, 1960, the Jury heretofore chosen, sworn and impaneled and sitting together in this case to hear the evidence of the State and the evidence of the defendants, argument of counsel, and the charge of the Court, and said for its verdict that the defendants John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown,

Frank McGill Coleman, Joan Harris Nelson Donovan Phillips, and Lacy Carrole Streeter, and each of them, are Guilty as charged.

---

IN THE SUPERIOR COURT OF DURHAM COUNTY

JUDGMENT AND APPEAL ENTRIES

The Court: Case No. 410, John Thomas Avent. Are you one of the leaders?

John Thomas Avent: I don't know what you mean by leader.

The Court: Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a period of fifteen (15) days.

Defendant gives notice of appeal to the Supreme Court of North Carolina. Notice of appeal given in open court. Further notice waived. Appearance bond fixed at $300.00. [fol. 16] Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 418, Shirley Mae Brown. Are you one of the fourteen leaders?

Shirley Mae Brown: I am one of the followers.

The Court: You are one of the followers. Judgment of the Court is that the Prayer for Judgment be continued for a period of two years.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $300.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

The Court: Case No. 425, Frank McGill Coleman. Are you one of the leaders?

Frank McGill Coleman: Yes, that's true.

The Court: That's true. What's true?

Frank McGill Coleman: That I am one of the leaders.

The Court: You have been connected with all this disturbance down the street since February 8th of this year?

Frank McGill Coleman: If you describe it in that manner. Yes, sir, I have been connected.

The Court: Well, whatever it is, that has been going on down the street in the second block from here to my left?

Frank McGill Coleman: Yes, sir.

The Court: Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a term of thirty (30) days to be assigned to work under the supervision of the State Prison Department.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $500.00. Appeal bond for cost is [fol. 17] fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

---

The Court: Case No. 416, Callis Napolis Brown. I believe you said you were one of the leaders?

Callis Napolis Brown: Yes, sir.

The Court: And you have been connected with all this disturbance or whatever has been going on in the second block to my left since February 8th?

Callis Napolis Brown: If that's the way you want to put it.

The Court: Well, is there any other way you want to put it?

Callis Napolis Brown: Yes, sir.

The Court: How do you want to put it?

Callis Napolis Brown: It is not a disturbance.

The Court: Judgment of the Court is the defendant be imprisoned in the common jail of Durham County for a term of thirty (30) days to be assigned to work under the supervision of the State Prison Department.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $500.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

---

The Court: Case No. 467, Joan Harris Nelson. Are you one of the leaders?

Joan Harris Nelson: No, sir.

The Court: What?

Joan Harris Nelson: No. I am not one of the leaders.

The Court: Prayer for judgment continued for a period of two years.

*Defendant gives notice of appeal*, in open court, to the Supreme Court of North Carolina. Further notice waived. [fol. 18] Appearance bond fixed at $300.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

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The Court: Case No. 472, Donovan Phillips. Donovan, are you one of the leaders?

Donovan Phillips: Yes, sir.

The Court: Sir?

Donovan Phillips: Yes, sir.

The Court: Are you bragging or just . . .

Donovan Phillips: No, sir.

The Court: Are you one of the same kind of leaders as Coleman and Brown?

Donovan Phillips: Yes, sir.

The Court: Equal authority with them for the disturbance that's been going on up there?

Donovan Phillips: Yes, sir.

The Court: You were in this conspiracy or plan or agreement the night before to go and do these things?

Donovan Phillips: Yes, sir.

The Court: You were one of the leaders in the thing?

Donovan Phillips: Yes, sir.

The Court: Your name is Donovan Phillips?

Donovan Phillips: Donovan Phillips.

The Court: Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a term of thirty (30) days to be assigned to work under the supervision of the State Prison Department.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $500.00. Appeal bond for cost is fixed at $150.00. Statutory time prevails for the prepara-

tion of statement of case on appeal unless otherwise agreed to by the Solicitor.

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The Court: Case No. 485, Lacy Carrole Streeter. Are you one of the leaders?

Lacy Carrole Streeter: Yes, sir.

[fol. 19] The Court: You boys are different from Avent; you have different authority in this group than Avent did, didn't you? . . . Are you one of the fourteen leaders in this group?

Lacy Carrole Streeter: Yes, sir.

The Court: Are you one of them that went back and got arrested again as soon as you were released down here?

Lacy Carrole Streeter: I have only been arrested once.

The Court: One time . . . And you have been arrested twice, haven't you? (As to Donovan Phillips)

Donovan Phillips: Yes, sir.

The Court: And Brown, you have been arrested twice?

Callis Napolis Brown: Yes, sir.

The Court: And Coleman, you have been arrested twice?

Frank McGill Coleman: No, sir.

The Court: You have only been arrested once?

Frank McGill Coleman: Yes, sir.

The Court: And Streeter, you say, your participation and your part of all of this, that that you have been in, has been equal to Brown's and the other two gentlemen, but superior to that of Avent?

Lacy Carrole Streeter: No. It's been equal to Brown's and Phillips'.

The Court: But superior to that of Avent?

Lacy Carrole Streeter: I believe so.

The Court: Those who lead have the greater responsibility and the greater punishment. However, you have only been arrested one time.

Judgment of the Court is that the defendant be imprisoned in the common jail of Durham County for a term of twenty (20) days.

Defendant gives notice of appeal, in open court, to the Supreme Court of North Carolina. Further notice waived. Appearance bond fixed at $350.00. Appeal bond for cost

is fixed at $150.00. Statutory time prevails for the preparation of statement of case on appeal unless otherwise agreed to by the Solicitor.

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[fol. 20]

IN THE SUPERIOR COURT OF DURHAM COUNTY

**Statement of Case on Appeal**

This is a criminal trial on bills of indictment charging the defendants with entering and trespassing upon the land of another, without license, having been forbidden to do so. The cases have been consolidated for trial; said bills of indictment appearing in the record proper. The cases were tried June 30, and July 1, 1960, before his Honor Raymond B. Mallard, the Judge presiding at the Criminal Term of Superior Court of Durham County, North Carolina, and the Jury, and the following proceedings were had.

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The following witnesses, being duly sworn, testified as follows:

STATE'S EVIDENCE

W. K. BOGER:

Direct examination.

By Mr. Murdock:

I live in Durham. I am the manager of the local store operated by S. H. Kress & Company. We have but one store in Durham. The store is located on the corner of Main and Mangum Sts. The address is 101-103 West Main Street. On May 6, 1960, I was the manager of this store. There was no other official, agent or officer of the company over me in Durham. I had complete control and all of the authority over this store and the property of S. H. Kress here in Durham; property located at 101-103 West Main Street belongs to S. H. Kress & Company.

I was in the store on May 6, 1960, and the defendants John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Dono-

van Phillips, and Lacy Carrole Streeter were also in the store on that date. They were in the vicinity of the luncheonette department. That department is located in the rear of the basement on the basement floor. We have two selling floors and three stockroom floors. In all, there are [fol. 21] five floors in the building. On May 6, 1960, the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees. We had signs posted over that department stating that the department was being operated for employees and guests only. We had iron railings separating this department from other departments in the store. There were chained entrances on that date.

On May 6, 1960, these seven defendants were in our store. I had conversations with every one of them. I very nicely stated that the department was open for employees and invited guests, and I said to them that I am sorry, I am going to have to ask you to leave. Before they were seated at the lunch department, I asked them not to be seated, and when they were seated, I asked them to leave the premises. They refused to leave until they were served. I called an officer of the City Police Department. The officer asked them to leave and they still would not leave, so he arrested them and charged them with trespassing, and that is the charge upon which they are being tried today. At that time, I was the manager and in charge of the property of the Kress Company, and, under the circumstances, I did not want them on the premises. Five of these defendants are Negro, and two of the defendants are white.

Cross examination.

By Mr. C. O. Pearson:

Mr. Boger: I spell my name B-o-g-e-r. I have worked for the Kress Company thirty years. Before coming to Durham, I worked in Jacksonville, Florida. When I came to Durham, these sit-down demonstrations were in progress. The fountain was closed when I came to Durham, but I did not come here for the purpose of opening up the foun-

tain. I had a conversation with these defendants, both white and Negro, and I spoke to them in a nice manner and they spoke to me in a nice manner. There was no ill feeling on my part, and there was no ill feeling on their [fol. 22] part. There was a little loud talking on the part of the defendants, but, generally, they were orderly and quiet.

Kress Company operates stores all over the country. It is the policy of our store to wait on customers dependent upon the customs of the community. The object of operating our store is definitely to make a profit. We have a stand-up counter on the first floor, and we serve Negroes and whites at that stand-up counter. We also serve white people who are accompanied by Negroes at that stand-up counter. We did not have a sign over our entrances which said in effect that Kress Company does not solicit the patronage of Negro people. That has never been necessary. Up until that time it was not necessary to forbid any Negroes from coming into our store. I don't know exactly how many counters we have in the store, but I could give you a rough estimate. It is the policy of our store to operate all counters in the interest of the customs of the community. I think we have 50 counters in the store. It it the policy of Kress to accept patronage of Negroes at those 50 counters. It is also the policy of Kress to accept the patronage of white people accompanied by Negroes at those fifty counters.

In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangement. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson, I do not consider you as an invited guest, under the circumstances right now. I do consider Mr. Murdock an invited guest under the circumstances. White people are considered guests. White people accompanied by Negroes are not considered

[fol. 23] guests. Our employees did not have that right to invite guests to our luncheonette. I was the person who invited the guests. I did not send out invitations. It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Had these two young people (indicating the white defendants) come into the store on that date alone, under the circumstances I would not have served them. Had they come into the store on May 4, 1960, I would not have served them for the reason that they made every effort to boycott my store. I first came to Durham on March 21. I do not know all of the white people in Durham, and I do not know all the white people at Duke University. I have seen these people before May 6, 1960. I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave. There are two entrances to my store on Main Street. I have never put up a sign over either one of those entrances to the effect that they would read "For Colored People or for White People."

There were no police in the store at the time these defendants came in. I did not seek police protection.

Redirect examination.

By Mr. Murdock:

These seven defendants were not employees of our store on May 6, 1960. They did not have any authority or permission to be in that part of the store that I asked them to leave. It was the conduct of the defendant Joan Harris Nelson, the white girl, that made me ask her to leave.

Recross examination.

By Mr. C. O. Pearson:

I asked her to leave because she gave her food to a Negro. I told her that I would be glad to give her a refund for what she paid for the food. And I told her if she

[fol. 24] wanted to feed this person, if she was hungry, I could make arrangements for her to go back and feed her, but I did not want a disturbance caused at my lunch department, and she refused to do so; therefore, I had to ask her to leave.

Redirect examination.

By Mr. Murdock:

I have been with the S. H. Kress Company for thirty years. I was assistant manager in the Durham store for three years; 1937, 1938, and 1939. I ran my first store in Oklahoma.

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CAPT. CANNADY:

Direct examination.

By Mr. Murdock:

I am Capt. Cannady of the Durham Police Department, and I was Captain on May 6, 1960. As a result of a call to our Department, I went to S. H. Kress and Company. I saw these seven defendants, that is six of them, with the exception of Mr. Coleman. They were seated at the lunch counter at S. H. Kress. I heard Mr. Boger ask each of these defendants to leave and they refused to do so. I then advised them that they could either leave or they would be arrested for trespassing. They refused to leave and as a result I charged them with trespassing.

Exception #3: Defendants except to the Court's ruling on the following:

Q. You know that Mr. Boger was the manager of the store?

A. Yes, sir.

Q. And they knew that he was and had been so told by you and by him?

A. Yes, sir.

Q. That he was manager and in charge?

A. Yes, sir.

Mr. Marsh: I object. I can't hear the questions and I can't hear the answers.

Court: Speak a little louder then, Mr. Solicitor and Mr. Witness.

Mr. Marsh: I want her to read back the last question that Mr. Murdock asked.

[fol. 25] Court: Read them to him, Miss Nelda.

Reporter: "Q. You knew that Mr. Boger was the manager of the Store?

A. Yes, sir.

Q. And they knew that he was and had been so told by you and by him?"

Mr. Marsh: Now, that I object to as leading the witness.

Court: The objection comes too late. Put in this. The objection comes after the witness has answered the question and it comes too late.

Mr. Marsh: I couldn't hear the question, may it please the Court.

Court: Well, there are five others sitting there and there was no objection made.

Mr. Marsh: Motion to strike the answer relative to the last question asked by Mr. Murdock.

Motion denied—Exception #3.

Cross examination.

By Mr. Marsh:

Capt. Cannady: I asked six of these defendants to leave, and Mr. Boger asked them to leave in my presence. I have been a member of the Durham Police Department for ten years. We make an arrest when an offense is committed in our presence. After Mr. Boger asked these defendants to leave, in my presence, and they refused to leave, that constituted trespassing. He did not sign the warrants after the arrest. I did not have a warrant with me when we made the arrest. Mr. Boger did not sign the warrant before we arrested them.

Capt. Seagroves and I went to the store, that is Kress' store, after we received the call from the radio operator that Mr. Boger stated that there was a disturbance at the

store. When we arrived, we found Mr. Brown seated at the lunch counter. At that time, he was the only one there. We arrested Mr. Brown and started back to the station, but before we could get back to the street, someone hollered, "You had better go back." So I went back downstairs, and it appeared that there were 30 or 40 seated there. After Mr. Boger told these defendants to leave, I arrested them [fol. 26] for trespassing. Capt. Seagroves and I were the only officers to begin with. However, I called for another car, and two officers came in that car. The only reason for the arrest is that I felt that they were trespassing. Otherwise, their conduct and deportment was very good.

Redirect examination.

By Mr. Murdock:

The only crime committed in my presence, as I saw, it was their failure and refusal to leave when they were ordered to do so by the manager.

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IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #4:

MOTION FOR DISMISSAL AS OF NONSUIT AND DENIAL THEREOF

Mr. McKissick: Now comes the defendant, through his or her attorneys, and moves the Court to dismiss this action as of nonsuit for the following reasons:

I. That the evidence shows that the defendant is a citizen of the State of North Carolina and of the United States, and entered S. H. Kress and Company for the purpose of shopping and using the facilities of said Store as are normally used by persons of the white race; that the defendant was arrested for trespass and when said defendant took a seat and requested service at the lunch counter of the S. H. Kress and Company Store; that said defendant had purchased other articles in said Store and had entered upon the premises lawfully and in an orderly manner; that said defendant had been trading at said store for a long period of time prior to said arrest.

II. That this action should be nonsuited in that the Court lacks jurisdiction as required under the Fourteenth Amendment to the United States Constitution to enforce G. S. 14-134 (Trespass), as here sought to be applied, in that the enforcement of G. S. 14-134 constitutes, (a) an arrest by the Police Department, which action, being a State action, [fol. 27] is in violation of this defendant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. That the enforcement of the Trespass Law, G. S. 14-134, under the circumstances as presented by the evidence in this case, to wit: The defendant, after being invited on the premises of S. H. Kress and Company generally, as alleged in the indictment herein, this defendant is charged is violative of defendant's constitutional rights, (a) under the privilege and immunities clause; (b) equal protection of the law clause; and (c) the due process clause of the Fourteenth Amendment to the United States Constitution.

IV. That the S. H. Kress and Company is operating its lunch counter pursuant to the authority granted by North Carolina General Statutes 72-46, and therefore cannot deny service to this defendant because of his race and color, as said statute has no standard based upon race. That by refusing to serve this defendant, said Store has violated the defendant's rights to the equal protection of laws clause, and the due process clause of the Fourteenth Amendment to the United States Constitution in denying this defendant service; that the refusal to serve this defendant is in violation of his rights under the Civil Rights Act of 1866: "All citizens of the United States shall have the same right, in every State and territory, as in enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property," and that the refusal to serve this defendant is violative of the valuable property right existing in and belonging to said defendant.

V. That this defendant, while using the facilities of the S. H. Kress and Company duly licensed by the City of Durham and County of Durham for the purpose of carry-

ing on a business open to the general public, which this defendant is a part of, was charged with trespass, while [fol. 28] being in said public place, on account of his race and color, which criminal charge is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process (clauses) of the laws as set forth in the two constitutional provisions as hereinbefore set forth.

VI. That for the further reason that the S. H. Kress and Company has been duly licensed by the City of Durham, County of Durham, and said license does not grant the owner of said Company the privilege of discriminating against citizens of the City of Durham, and the County of Durham, on account of race and color, and the State, by arresting said defendant under G. S. 14-134, further violated defendant's right as guaranteed him under the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 17 of the Constitution of the State of North Carolina.

VII. That the provisions of North Carolina General Statutes, 14-134 is unconstitutional in that it is vague and indefinite because the statute itself does not require the possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is in violation of his constitutional rights guaranteed under the due process and equal protection clause, Article I, Section 17 of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the United States Constitution.

VIII. That the State of North Carolina, by the use of its police power, through an officer of the Durham City [fol. 29] Police Department, in arresting this Negro defendant pursuant to North Carolina General Statutes, Chapter 14, Section 134, was unconstitutional in that the

arrest was denial of due process and equal protection of the laws guaranteed by Article I; Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open to the public, in carrying out possessor's whims and caprices against serving members of the Negro race on the same basis as members of other races, all of whom have been invited to use said establishment, solely on the basis of race and color.

IX. That this Negro defendant, who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment, was denied use of said establishment on the same basis as other members of the public, solely because of their race and color and having been arrested by the State of North Carolina through the Durham City Police Department under North Carolina G. S. 14-134 for attempting to exercise his right to equal treatment as invitee of S. H. Kress and Company solely because of his race and color was a denial of due process and equal protection of the laws as guaranteed him by Article I, Section 17, of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

X. That the warrant is fatally defective in that it fails to allege sufficient possession in W. K. Boger and that it fails to identify W. K. Boger as being the person with the authority to evict this defendant.

This 30th day of June, 1960.

Respectfully submitted:

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr.,
[fol. 30] L. C. Berry, Jr., M. Hugh Thompson,
W. G. Pearson, II., Counsel for Defendant.

The Court: Motion denied.
Exception: See Stipulation No. 5, infra.

Exception #4.

IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #5:

MOTION FOR DISMISSAL AS OF NONSUIT AND DENIAL THEREOF

Mr. McKissick: Now comes the defendant, through his or her attorneys, and moves the Court to dismiss this action as of nonsuit for the following reasons:

I. That the evidence shows that the defendant is a citizen of the State of North Carolina and of the United States, and entered S. H. Kress and Company for the purpose of shopping and using the facilities of said store as are normally used by persons of the white race; that the defendant was arrested for trespass when said defendant took a seat and requested service at the lunch counter of the S. H. Kress and Company Store; that said defendant had purchased other articles in said store and had entered upon the premises lawfully and in an orderly manner; that said defendant has been trading at said Store for a long period of time prior to said arrest.

II. That this action should be nonsuited in that the Court lacks jurisdiction as required under the Fourteenth Amendment to the United States Constitution to enforce G. S. 14-134 (Trespass), as here sought to be applied, in that the enforcement of G. S. 14-134 constitutes, (a) an arrest by the Police Department, which action, being a State action, is in violation of this defendant's rights as guaranteed by the Fourteenth Amendment of the United States Constitution.

[fol. 31] III. That the enforcement of the Trespass Law, G. S. 14-134, under the circumstances as presented by the evidence in this case, to wit: The defendant, after being invited on the premises of S. H. Kress and Company generally, as alleged in the indictment herein, this defendant is charged in violation of defendant's constitutional rights, (a) under the privilege and immunities clause; (b) equal protection of the law clause; and (c) the due process clause of the Fourteenth Amendment of the United States Constitution.

IV. That the S. H. Kress Company is operating its lunch counter pursuant to the authority granted by North Carolina General Statutes 72-46, and therefore cannot deny service to this defendant because of his or her association with members of the Negro race on attempting to use the eating facilities of S. H. Kress and Company in Durham, North Carolina; that by refusing to serve this defendant, said Store has violated the defendant's rights to the equal protection of laws clause, and the due process clause of the Fourteenth Amendment to the United States Constitution.

V. That this defendant, while using the facilities of the S. H. Kress and Company duly licensed by the City of Durham and the County of Durham for the purpose of carrying on a business open to the general public, which this defendant is a part, was charged with trespass, while being in said public place, on account of his or her association with members of the Negro race, is in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Constitution of the State of North Carolina, in that this defendant has been denied the equal protection and due process laws as set forth in the two constitutional provisions as hereinbefore set forth.

VI. That for the further reason that the S. H. Kress and Company has been duly licensed by the City of Durham, [fol. 32] County of Durham, and said license does not grant the owner of said Company the privilege of discriminating against citizens of the City of Durham, and the County of Durham, on account of race and color, and the State, by arresting said defendant under G. S. 14-134 for his or her association with Negroes in attempting to eat on the premises of S. H. Kress and Company further violated defendant's rights as guaranteed him, her, under the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 17 of the Constitution of the State of North Carolina.

VII. That the provisions of North Carolina General Statutes 14-134 is unconstitutional in that it is vague and indefinite because the statute itself does not require the

possessor or the person in possession to properly identify himself to the accused. Criminal statutes must be reasonable and clear in order to deprive a person of his liberty on the grounds that the accused violated a criminal statute and to arrest a person pursuant to an indefinite and vague statute is in violation of his constitutional rights guaranteed under the due process and equal protection clauses, Article I, Section 17, of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

VIII. That the State of North Carolina, by the use of its police power, through an officer of the Durham County Police Department, in arresting this white defendant pursuant to North Carolina General Statutes, Chapter 14, Section 134, was unconstitutional in that the arrest was denial of due process and equal protection of the laws guaranteed by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, because the arrest was made in aiding the possessor of S. H. Kress and Company, which is open [fol. 33] to the public, in carrying out possessor's whims and caprices against serving members of the Negro race or members of the white race associated with them, all of whom have been invited to use said establishment, solely on the basis of race and color.

IX. That this white defendant, who was on the premises of S. H. Kress and Company pursuant to an invitation to the general public by the establishment, was denied use of said establishment, on the same basis of other members of the public, solely because of his or her association with members of the Negro race and, having been arrested by the State of North Carolina through the Durham City Police Department under North Carolina G. S. 14-134 for attempting to exercise his or her right to equal treatment as invitee of S. H. Kress and Company solely because of his or her association with members of the Negro race was a denial of due process and equal protection of the laws as guaranteed him of her by Article I, Section 17 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States.

X. That the indictment is fatally defective in that it fails to allege sufficient possession with W. K. Boger and that it fails to identify W. K. Boger as being the person with the authority to evict this defendant.

This 30th day of June, 1960.

F. B. McKissick, C. O. Pearson, W. A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, W. G. Pearson, II., Counsel for Defendants.

The Court: Motion denied.
Exception: See Stipulation No. 6, infra.

Exception #5.

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[fol. 34]

IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #6.

ADDITIONAL MOTIONS FOR DISMISSAL AS OF NONSUIT AND DENIAL THEREOF

Mr. McKissick: The indictment charging the defendant, a Negro, with the violation of G. S. 14-134, to wit, an alleged trespass upon the land after having been forbidden to enter is invalid in that the evidence establishes merely that the defendant was peacefully upon the premises of S. H. Kress and Company, an establishment performing an economic function invested with the public interest as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the indictment other than an effort to exclude the defendant from S. H. Kress and Company because of his race or color. Defendant at the same time is excluded from equal service that the preponderant number of other eating establishments in the City of Durham, thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the Fourteenth Amendment to the United States Constitution.

The Court: Motion denied.
Exception: See Stipulations 5 and 6, infra.
Exception #6.

Exception #7:

Mr. McKissick: That the evidence offered against the defendants in support of the indictment charging him with trespass establishes that they were at the time of the arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in S. H. Kress and Company, an establishment performing an economic function invested with the public interest. That defendants peacefully were attempting to obtain services at the facilities of the S. H. Kress and Company in the manner which other white persons similarly situated do. And at no time were the defendants defiant or in breach of the [fol. 35] peace, and was at all times upon an area essentially public. Wherefore, defendants have been denied rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The Court: Motion denied.

Exception: See Stipulations 5 and 6, infra.

Exception #7.

Exception #8.

Mr. McKissick: The evidence established that the prosecution of the defendants was procured for the purpose of preventing them from engaging in peacefully assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in the City of Durham to permit the defendants and other members of defendants' race from enjoying the access to certain stores, facilities and accommodations afforded members of other races, and that by this prosecution prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce racially discriminatory policies contrary to the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court: Motion denied.

Exception: See Stipulations 5 and 6, infra.

Exception #8.

IN THE SUPERIOR COURT OF DURHAM COUNTY

DEFENDANTS' EVIDENCE

LACY CARROLE STREETER:

Direct examination.

By Mr. McKissick:

I am Lacy Carrole Streeter, age 24, address Box 2727, North Carolina College. My permanent address is 1401 West Third Street, Greenville, North Carolina. I am a member of the Negro race. I am a senior at North Carolina College. I was in S. H. Kress store on May 6, 1960. On [fol. 36] that date, I went into the store at the first level and made a purchase at the paper counter. After making the purchase, I went down to the lunch counter and took a seat there, and later I was asked to leave the lunch counter before receiving service. I have been in Kress Store on many occasions prior to May 6, 1960. I stopped at the upstairs counter of Kress and I can identify the item that I purchased there. The item was a note pad, which on the counter with school supplies and office supplies. I received a receipt with my purchase.

(Note pad was introduced as Defendants' Exhibit A without objection.)

After I made my purchase, I came back toward the front entrance and went downstairs to the basement. I went to the lunch counter, took a seat and waited to have my order accepted by the waitress. The waitress never accepted my order. She never approached me. No one ever asked me what I was going to purchase. As I was sitting at the lunch counter, Mr. Boger said something to the other defendants there, and the officers accompanying him would direct them to the door near the rear of the counter. No one ever said anything to me. I continued to sit at the counter awaiting the waitress to take my order.

After Mr. Boger spoke to several of the other students there, the police officer approached me and then directed me toward the rear of the lunch counter, and I assumed I

was being placed under arrest. No one ever asked me to leave the lunch counter, neither Mr. Boger nor Capt. Cannady asked me to leave. The officer made no verbal request for me to leave. He just directed me toward the rear of the lunch counter. He did not tell me why he wanted me to move over there with the other students.

Cross examination.

By Mr. Murdock:

I have been at North Carolina College for three years, and my senior year is coming up. I have been here since [fol. 37] 1958. I have been in Kress' on other occasions, maybe sometimes once every two weeks, sometimes once a week. I had the occasion to go to Kress' between February, 1960, and May 6, 1960. The purpose was to request service at the lunch counter. I recall that I requested service at the lunch counter on February 8, 1960. I remember that occasion, but I don't recall any one other than that. The lunch counter was closed for a long period of time.

I had no other occasion to go into the store during that period other than for the purpose of seeking service at the lunch counter. I am not familiar with any boycott of the store. I was familiar with the people who were walking in front of the store with signs on them. There were numerous signs that they were carrying, but I don't recall any specific one. The purpose of doing that was to promote or to encourage the service of Negroes at the lunch counter. That was the basic purpose of the movement. The purpose of carrying these signs was to encourage people to shop at the store if they could receive service at all of the counters in the store. We were encouraging people to shop at the store if they could receive service in the store.

We had been refused service at the lunch counter earlier this year. There was more than one occasion. I did not know that I was not welcome at the lunch counter. I knew that I had not received service there on prior attempts. I continued to try to get service there. There were no attempts made to stop me from entering the door. No one objected to my entering. I had not been informed that there had been any change in the policy of the Company

from February up to May 6. My purpose for carrying the signs was to encourage people to be received in all sections of the store. I bought these pads because I needed them, and, secondly, to see if my services or my patronage would be accepted on the first floor. I have never been refused [fol. 38] service on the first floor. I have never been refused service in any part of the store except the lunch counter. I use them for scratch pads. I bought them to see if my patronage would be accepted. We had decided, that is the students who were taking part in the movement, that we would make a purchase. There had been a general agreement reached by these students participating to the effect that we would make a purchase to see if our patronage would be accepted on the first floor.

We have counsel. I have consulted counsel about these matters. I had not consulted counsel on the specific point of making a purchase. I have consulted with counsel prior to making my decision of going to the lunch counter. It was not on the advice of counsel that I did this. I walked through the normal passageway to get to the lunch counter. There was no chain across it. There were others with me at the time I entered. I do not recall the exact number. There were five or six who accompanied me. There were some students already seated there when I arrived. These students agreed to make a purchase before attempting to gain service at the lunch counter. There were approximately 35 or 40. The 35 or 40 went to the lunch counter within a margin of 35 or 40 minutes. I don't recall that any of them went under the rail to get in.

I didn't know at the time whether or not I would be arrested for trespassing. I did not want to be arrested for trespassing. I didn't think that I would be arrested for trespassing. When I entered the door upstairs I wasn't arrested, and I didn't think that I would be arrested downstairs. I went there for service. I expected to be served. I had tried on other occasions to be served, but I was refused service. However, I continued to try, and I did not know whether or not I would be served. A police officer directed me toward an assembly of students. I was never ordered to leave or requested to leave by the manager or [fol. 39] any other person in charge of the store. I learned

that I had been charged with trespassing at the Police Station. I asked if I was under arrest, and I asked the officer if he knew what we were being charged with, and he said he thinks it would be trespassing. Officer Spangler told us this while we were in the store. I had enough money on my person to buy more than a glass of water. I don't recall how much money I had in my pocket at that time. I had as much as fifty cents.

I don't know whether any arrangements had been made for bond for me in the event that I was arrested. I made no arrangements for bond. I left the matter of a bond to my attorneys. I employed my attorneys in February. I started consulting with my attorneys in February. I kept them retained until May 6, 1960. I did not know whether or not I would be arrested. There was a possibility, though, of my arrest. However, I did not want to be arrested. I was going to request service at the lunch counter, and I employed counsel in case there was a possibility of an arrest. I didn't expect to do anything to violate the law.

I was not requested to leave by the management. I intended to stay there until I was served, as long as I was orderly. There was a possibility, I felt, that I would be arrested, even after having been requested to leave if I stayed. That was one of the reasons I retained counsel. I took the pads that I bought back to the student meeting after having been released from jail. At the student meeting, we decided to keep the pads for the purpose that we have used them here today. I was in jail when some of the others were arrested, and I don't know whether all of the students made a purchase on that date. But whatever we purchased we decided in the meeting after the arrests that we would keep the purchase to be used in evidence. We were never instructed to do this. We had never been advised to do this. But we decided to do this after discussing the matter with the group.

[fol. 40] Redirect examination.

By Mr. McKissick:

I felt I had a right to seek service at the lunch counter in Kress' when I went there and after having been served

on the first floor, I felt that I had a right to receive service at the lunch counter.

Recross examination.

By Mr. Murdock:

I have not been instructed that the law does not give me the right to seek service there; moreover, I have not been instructed that if I had been refused service and requested to leave and refused to leave, that I would be violating the law. I left when the officer directed me to leave. I had no intentions of remaining after having been instructed to leave by the officer.

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DONOVAN PHILLIPS:

Direct examination.

By Mr. McKissick:

I live at 1109 Fayetteville Street, but my permanent address is 1309 West Fourth Street, Greenville, North Carolina. I am 19 years of age. I attend school at North Carolina College. My classification is senior. I know where S. H. Kress is located. It is located on the corner of Mangum and Main Streets. There is a very large sign indicating that this is Kress' Store. The sign is about 50 feet wide and 8 feet high. There are two entrances to the S. H. Kress Store, and these entrances are located on Main Street. There is no sign over either of these entrances saying, "For White Only." There is no sign saying "For Colored Only." I was in S. H. Kress Store on May 6, 1960. I was not stopped by anyone when I went into this store. When I went into the store, I went to the counter that sold paper and school supplies. The counter is about three or four counters down in the store. When I went to the school supplies counter, I purchased a pad of lineless paper. I received a receipt for my purchase.

[fol. 41] (At this point the lineless paper was introduced into evidence, without objection, as Defendants' Exhibit B.)

After I made this purchase, I went downstairs to the lunch counter, located in the basement of the store. When I got on the basement floor, no one ordered me out. No one ordered me out of the store until I got to the lunch counter. When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, "You are not an invited guest, and you are not an employee; so I am asking you to leave." Before I could ask him who he was, the police officer directed me to the back of the store. The police officer was Capt. Seagroves. Mr. Boger said nothing more to me than I have already stated. Capt. Seagroves just said, "Get up," and he pointed to the back of the store. After I was arrested, we were taken up the back steps of Kress' and out the back, and we walked to the jail. They fingerprinted us after we had been put in the cells.

No one read a warrant to me in Kress' Store. The warrant was read to me while I was being fingerprinted at the Police Station. I had been in Kress' Store approximately once in two weeks or had just dropped in and picked up an occasional article prior to May 6, 1960. There is a stand-up lunch counter upstairs, and I have been served along with white people. I have never been refused service at the stand-up lunch counter upstairs, and I have never been ordered to leave the store while frequenting the upstairs lunch counter. I was a regular customer at Kress' prior to February 8, 1960. I am a member of the Negro race.

Cross examination.

By Mr. Murdock:

I was a customer at Kress' prior to February 8, 1960, but I have discontinued my patronage of this store. We were encouraging the patronage of this store if all Negroes could be served at all counters in the store. Otherwise, we were not to patronize the store. I bought the notebook [fol. 42] paper because it was the decision of the group at a meeting held previously to make a purchase before we went downstairs to try to obtain service. I expected

to be served at the lunch counter. I did not expect to be ordered out. I did not expect to be arrested. I didn't get a chance to leave when Mr. Boger asked me to leave because I was directed to the back of the store by Capt. Seagroves. Had I been given an opportunity to leave, I don't know whether or not I would have left. If the police officer had directed me to leave the store, I would have left. I would have left at the request of the manager, if he had identified himself. I didn't get a chance to ask him who he was.

I marched in the picket line carrying signs. I don't know what was on the sign. I carried several of them. I remember on one of the signs that this language appeared: "Segregation is the Negro's Burden and America's Shame," by M. L. King. I remember another one which said, "It's Spring, Let Democracy Flower." At the moment, I don't recall any others.

Redirect examination.

By Mr. McKissick:

At the time I went into S. H. Kress I believe I had a constitutional right to be served at that lunch counter.

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JOAN HARRIS NELSON TRUMPOWER:

Direct examination.

By Mr. McKissick:

My name is Joan Harris Trumpower. My Washington address is c/o Rev. D. R. Diamond, New Men's Dormitory, Howard University; and here it is c/o Rev. Charles Johnson, Presbyterian Chaplain, Duke University. On May 6, 1960, I was a freshman at Duke University. On this date I went into S. H. Kress Company alone. When I went into the store, I walked around and looked at the various counters. There were several things I thought I might like to [fol. 43] buy. I went over and bought a ball point pen, as I needed one. (At this point the ball point pen was in-

troduced into evidence, without objection, as Defendants' Exhibit C.)

I have patronized Kress' prior to the date that I was arrested. I imagine that I have visited this store about half a dozen times. I have visited this store with another young lady, who is white, but on this occasion I went alone. After I made my purchase at the stationery counter, I went downstairs to the lunch counter. When I got to the lunch counter, a waitress asked me for my order. She brought me food, and I was eating it. The lunch counter was almost full of customers. There were no Negroes there at that time. This man (indicating Mr. Boger) came up to me as I was eating there and said that I was not invited, and I said to him that I spent my money upstairs in this store and that I could not understand how he determined that I was not a guest; and he said that I was antagonizing the customers, and then a police officer came, and I asked him if I was being arrested, and he said, "Let's go." While I was there, I ran into several students from Duke, and they left, but I had not finished.

Several students from North Carolina College came in and sat on either side of me. I talked to those students at that time, and I offered to buy some of them some food. When I offered them food, some of them were taken off by the officers, and it was not right away that the manager or police officer came up to me. Mr. Boger had the others arrested before he got to me. When he got to me, he said that I was not invited and that I would have to leave because I was antagonizing the customers. I did not leave at first because I wanted to know why, and while we were in the process of discussing this, the police officer told me, "Let's go." He did not offer to give me my money back and no mention was made of any money. He did not tell me that he was the manager of the S. H. Kress Company. [fol. 44] He did not say that he was one of the employees of the store. He was completely unidentified to me. The officer said, "Let's go." When I saw the way he was pointing, I walked back to the rear of the store. I am a member of the white race. I have not eaten at Kress' lunch counter prior to this time.

Cross examination.

By Mr. Murdock:

On May 6, 1960, I was a student at Duke University. I had not been attending these meetings with the students at North Carolina College in regard to the sit-ins. I have attended some since then—since May 6, 1960, I met some of the students at North Carolina College through some friends at Duke University who knew them. I had not met with them prior to May 6, 1960. I have been in the picket lines carrying signs in front of S. H. Kress Store. I had been interested in this movement when I first read of its happening in Greensboro. I did not participate in the Greensboro movement. I was in the picket line here about three times prior to May 6, 1960.

I was not instructed or advised to make a purchase in some other part of the store before going to the lunch counter. I purchased a ball point pen as I needed it. I was in the process of having a conversation with Mr. Boger during which he requested that I leave. I did not want to be arrested on that day. I did not expect to be arrested. I am now living in Alexandria, Virginia. I gave my address c/o Howard University. We are in the process of moving. My husband is not connected with Howard, but I have friends there, both white and Negro. The address that I gave belongs to a Negro friend. My husband is part white and part Indian.

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Callis Napolis Brown:

Direct examination.

By Mr. McKissick:

I live at 206 Pilot Street. I am 21 years of age, and [fol. 45] I am a senior at North Carolina College. On May 6, 1960, I went to Kress' Store and went to the counter that sells combs. This is the comb that I purchased, and this is the receipt for the purchase.

(At this point the comb was introduced into evidence, without objection, as Defendants' Exhibit D.)

Prior to February 8, 1960, I have been in Kress' Store on numerous occasions. I have never been in the section of the store where the stand-up lunch counter is located. I have never been refused service at any other counter in Kress' Store prior to February 8, 1960. After I made my purchase on May 6, 1960, I went downstairs to the lunch counter, and at that time I was the only Negro down there. Mr. Boger came over to me and said, "The custom has not been changed, and you will have to leave." I turned around and asked him if he was the manager; and I don't recall whether he said "yes" or "no." Capt. Seagroves of the Police Department said, "Fellow, the man told you to leave, so let's go." Capt. Seagroves took me by the belt up the back stairs, through Kress' Store, out the front door down Main Street to the Police Station. He did not read a warrant to me.

I first had a warrant read to me sometime late in May. When I heard that a warrant was out for me, I went to the detective's house and had him read it to me. That was Detective Frank McCrea. He lives on Nelson Street. I am a member of the Negro race. No warrant was ever read to me at the Police Station. They took my fingerprints down there. Capt. Seagroves arrested me. Lacy Streeter was not arrested at this time. I told Capt. Seagroves that it was not necessary for him to hold me by my belt because I was not going any place. And he said, "That is true, you are not." Capt. Seagroves was in uniform.

[fol. 46] Cross examination.

By Mr. Murdock:

I did not know Mr. Boger prior to that date. The movement sponsored here in Durham is strictly a student organization. The attempts to obtain service at the lunch counters and the sit-ins are one and the same. The movement is being sponsored and promoted by a student organization. I am a member of the student movement which protests against discrimination. There was an organization in existence in February to May, and I am a member of it.

I am a leader. There are approximately 14 leaders. There is no chief leader. Different people preside at different meetings. I preside at some of them. I am not ashamed of the fact that I am one of the leaders. We had a meeting on the night before May 6, 1960. We planned our strategy at that meeting. We planned to make a purchase in some other part of the store before going down to attempt to get service at the lunch counter. It was also decided that we would attempt to get service at the lunch counter. It was not decided that we would not leave until we were arrested, if we were requested to leave. However, it was discussed and decided that in the event that we were ordered to leave, we would remain until we were served. If the manager had requested that we leave, we would have left, if the manager had identified himself. We decided at our meeting if the manager requested us to leave we would leave without being served. I deny that we all went there for the purpose of being arrested so that we could make a test out of this.

Redirect examination.

By Mr. McKissick:

Exception #9:

Q. At the time that you went to the lunch counter on May 6, 1960, did you feel and believe that you had a right to service at this lunch counter?

Objection. The Court sustained objection.
Exception #9.

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[fol. 47] FRANK MCGILL COLEMAN:

Direct examination.

By Mr. McKissick:

My name is Frank Coleman. I live at 2219 Club Boulevard. I was born in Vicksburg, Miss., and I now live in Pittsburgh, Pa. I am enrolled at Duke University. I am in the Graduate School of Liberal Arts and Sciences. I am

majoring in political science. I am a member of the white race.

I was in Kress' on May 6, 1960, but had not been there prior to this time. When I went into the store, I bought a Mother's Day card. Then I joined my friend Bob Markham, and he and I went downstairs and seated ourselves at the lunch counter. While I was at the lunch counter, I asked the waitress if she would serve me and she refused. I asked her why, and she said that she did not have to explain her reason to me. Mr. Boger approached us. He did not identify himself at the time. He asked us to leave, and I asked him why. He said that we were not invited guests. I asked him how he determined this. I asked him if he sent out invitations by mail. I continued to sit there, and I again asked the waitress to serve us, and she said, "no."

Mr. Boger returned accompanied by a police officer. Mr. Boger would tap the six of us seated in a row and asked us if we were going to leave. We answered, "No, not until we are served." Then the police officer would announce that you are being arrested for trespassing. I continued to ask Mr. Boger how he could determine whether or not I was an invited guest. He did not answer. The police officer informed me that, since Mr. Boger had asked me to leave, and as I had not left, I was going to be arrested for trespassing. My friend Bob Markham is a Negro. I had two other friends, who are white, who had been served that day.

Cross examination.

By Mr. Murdock:

Mr. Boger, the manager, told me to leave, and I did not [fol. 48] leave. I had never attempted to get service in Kress' prior to this date. I have carried signs in front of Kress' and other stores discouraging people to trade with them.

SHIRLEY MAE BROWN:

Direct examination.

By Mr. McKissick:

I live at 206 Pilo' Street, here in Durham. I am a Negro. I am a sophomore at North Carolina College. I am 19 years of age. These are rubber bands that I bought in Kress'. (At this point, rubber bands were introduced into evidence, without objection, as Defendants' Exhibit E.) I bought them at the third counter from the front door. After making this purchase, I went downstairs to the lunch counter. I have never been there before. I have traded often at S. H. Kress Company prior to February 8, 1960. I took a seat at the lunch counter on May 6, 1960, after one of my friends, a gentleman from Duke University, gave me his seat. My friend had purchased a glass of iced tea and a sandwich, which he gave to me. One of the waitresses at the lunch counter came over and snatched the iced tea, the plate, and the napkin. However, I was eating the sandwich.

Mr. Boger, the manager of Kress', who was later identified to me, said, "This lunch counter is open for invited guests and employees of the store. I'll have to ask you to leave," and I told him that I would when I finished eating my sandwich. At that time, a police officer said, "Let's go," and pointed his finger to a little room in back of the lunch counter. The only conversation I had with Mr. Boger was that I told him I would leave when I finished my sandwich. He did ask me to leave, but he didn't tell me who he was or that he worked at the store. He did not tell me he was the manager. He did not tell me he was a police officer. A police officer was with him. I do not know who he was. He was a tall officer.

[fol. 49] Cross examination.

By Mr. Murdock:

I made this purchase in the store because I needed these rubber bands. The purchase was 11 cents. I needed the

purchase to go in my hair. I needed the rubber bands. I did not make the purchase because I had been instructed to do so. It was an agreement for all of us to make a purchase. It was not because we made an agreement to test the law. I expected to be served because I am a citizen. When we were picketing the store, we were encouraging people to purchase if they could be served. I carried lots of signs; one of them read, "Democracy Lies Here." We were encouraging people to trade with Kress' if they could be served, and on May 6, 1960, I expected to be served. A white gentleman from Duke made a purchase for me. He was served. He was already there when I got down there. He is not one of the defendants. I didn't know his name. He came down to the church and I knew him. Mr. Boger told me to leave, and I told him that I would after I finished eating the sandwich. I did not expect to get arrested, and I did not want to be arrested.

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JOHN THOMAS AVENT:

Direct examination

By Mr. McKissick:

I am 20 years old. My address is 2605 Chidley Hall, North Carolina College. My permanent address is General Delivery, Nashville, North Carolina. I went to S. H. Kress Company on May 6, 1960. I am a member of the Negro race. The item held is a pencil that I purchased from Kress' on that day. I have a receipt for my purchase. (At this point, the pencil was introduced into evidence, without objection, as Defendants' Exhibit F.) After I purchased the pencil upstairs, I went downstairs to the lunch counter. I waited a while until I could get a seat. When I got a seat, I sat down. While I was waiting to be served, [fol. 50] Mr. Boger, whom I did not know at the time, came up to me and said, "I am sorry; I am going to have to ask you to leave," and I asked him why. He said, "This counter is open only to invited guests and employees." And he said, "You are not an invited guest." Then the policeman, Mr. Cannady, said, "Let's go." He pointed me

to the direction of the other students. I felt at that time on May 6, 1960, as a citizen of the United States and as a member of the general public that, after I purchased the article upstairs, I would be welcomed downstairs.

Cross examination.

By Mr. Murdock:

I felt that I was entitled and had a right to be served at the lunch counter. I didn't know when I went in that I would not be served. I was surprised when they refused to serve me. I had not been accepted at that store's lunch counter since February. I carried signs in order to encourage patronage of the store, if the people were served downstairs at the lunch counter. I do not know whether any member of my race had been served at the lunch counter from February up to May 6, 1960, because I was not there every day. I expected to be served on May 6, because I had been served upstairs.

There were approximately 38 of us who went to the store, but not all at the same time. I was at the meeting the night before May 6. I cooperate with the people when I can, and on this night I agreed to go in with the people and take part. It was agreed that each of us would make a purchase in some part of the store before going to the lunch counter. I was not expecting to be arrested. When Mr. Boger asked me to leave, I did not leave because I did not know at that time who Mr. Boger was. I am a student, and I can cook. I have never been employed as a cook. Perhaps I carried the sign which read, "We Cook Here, Why Can't We Eat Here." When we said, "We," we were referring to my race. I have been interested in this movement since February, and I have been very active.

[fol. 51]

IN THE SUPERIOR COURT OF DURHAM COUNTY

RENEWAL OF MOTIONS AND DENIAL THEREOF

Exception #10:

Mr. McKissick: We renew our written motions to quash the indictments and also motions for dismissal as of non suit.

The Court: Motion denied.

Exception #10.

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IN THE SUPERIOR COURT OF DURHAM COUNTY

Exception #11:

CHARGE OF THE COURT

Gentlemen of the Jury: The defendants, John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Donovan Phillips, and Lacy Streeter Carrole, are each being tried upon a separate bill of indictment, each of said bills of indictment charging that on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, that such defendant, with force and arms, at and in the County aforesaid, did unlawfully, willfully and intentionally, after being forbidden to do so, enter upon the land and tenements of S. H. Kress and Company Store, located at 101 and 103 W. Main Street in Durham, North Carolina, said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had as agent and manager the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, leave that part of the said street reserved for employees and invited guest, willfully and unlawfully refused to do so, knowing or having reason to know that he, the said defendant, had no license therefor.

The defendants, and each of them, have come into court and entered a plea of not guilty. The plea of not guilty

thus interposed challenges the credibility of the State's evidence and raises in his or her behalf a presumption of innocence. That is the defendant in this, as in all criminal [fol. 52] cases, enters upon the trial presumed to be innocent, and this presumption remains with the defendant and surrounds him or her throughout the trial, and entitles him or her to an acquittal at your hands, unless and until the State has by competent evidence satisfied you and each of you of his or her guilt beyond a reasonable doubt.

The State has offered evidence which in substances tends to show that W. K. Boger is Manager of S. H. Kress and Company's Durham store; that S. H. Kress and Company is a corporation; that this store is located at 101 and 103 on Main Street, at the corner of Main and Mangum Streets in the City of Durham; that it has two entrances on Main Street. That W. K. Boger, on May 6, 1960, was the Manager and was in control and had authority over the store; that the building and premises were owned by S. H. Kress and was being operated as a store by S. H. Kress. That he, W. K. Boger, was in the store on this date, and that the defendants John Thomas Avent, Callis Napolis Brown, Shirley Mae Brown, Frank McGill Coleman, Joan Harris Nelson, Donovan Phillips and Lacy Streeter Carrole were in this store on that date; that they were in the vicinity of the luncheonette area downstairs; that there are five floors to this building—two sellings floors and three floors for storage. That on this date the lunch onette was in operation to serve customers that were invited and also to serve employees; that there were signs posted in the store and around the lunch department that the lunch department was open for invited guest and employees only; that there was an iron railing around this department with chains on three entrances to it.

That W. K. Boger talked with each of the seven defendants; that he told them that the lunch department was open to invited guest and employees; that they were seated in the lunch department and that he asked them to leave. They stated that they were refusing to leave until they were served. That the officers came and the officer asked [fol. 53] them to leave; that they still wouldn't leave, so

the officer arrested them. That he, W. K. Boger, as Manager of the S. H. Kress and Company Store and business on this occasion, did not want the defendants on the premises and had asked them to leave, and that they refused to do so. That none of the defendants were employees and none of the defendants had any authority to be in there when he asked them to leave.

State further offered evidence which in substance tends to show that Capt. Cannady is a member of the Durham Police Department; that on May 6, 1960, he was on duty; that as a result of a call he received he went to S. H. Kress and Company, and that he saw each of the defendants there except the defendant Coleman. That the Manager of the store was Mr. Boger, and that he heard Mr. Boger ask each of the defendants to leave in the presence of him, the officer. That each of the defendants refused to leave. That he then, the officer, told them to leave or he would have to arrest them. That they again refused to leave and that he arrested them. That they had been told by Mr. Boger that he was the Manager of S. H. Kress and Company and that he told these six defendants, all of the defendants except Coleman, that Mr. Boger was the Manager.

That's what some of the evidence for the State tends to show. What it does show, if anything, is for you to say and determine.

The defendants have offered evidence which in substance tends to show that Lacy Carrole Streeter is 24 years old; that he is a member of the Negro race; that he is a senior at North Carolina College; that he entered Kress' Store here in Durham on May 6, 1960, at about 12:30 to make a purchase; that he made a purchase and decided to go down to the lunch counter to receive service. That he sat down at the lunch counter and requested service. That he had purchased some note pads before coming down there and [fol. 54] had a sales receipt for them; that the sales receipt is dated incorrectly. That on this date he did not have any conversation with Mr. Boger and Mr. Boger did not say anything at all to him, and that Mr. Boger nor Mr. Cannady did not ask him to leave. That the police officer spoke to him and directed him toward the rear of

the lunch counter where some others of a group of people were standing.

Defendants have further offered evidence which in substance tends to show that Donovan Phillips is 19 years old; that he is a senior at North Carolina College; that he went to Kress' on this date; that there are no signs over the entrance to Kress' Store, here in Durham on Main Street, specifying race in any respect or limiting any race. That he made a purchase of lineless notebook paper; that after he purchased the notebook paper he went downstairs to the lunch counter; that nobody had ordered him out until he got to the lunch counter. That a man, later identified as Mr. Boger, told him he was not an invited guest and that he was not an employee and requested him to leave. That before he could do anything he was arrested by the officer and told to join a group back there. That he had been to Kress' Store before and had been served at the stand-up lunch counter on another floor. That he had never been to the downstairs lunch counter prior to the date that he was arrested. That he is a member of the Negro race.

Defendants have further offered evidence which in substance tends to show that Joan H. Nelson, on May 6, 1960, was a freshman student at Duke University; that she went to Kress' Store on this date by herself; that she bought a ball point pen; that she then went downstairs to the lunch counter; that she had patronized Kress' Store some half a dozen times before. That on this occasion at the lunch counter she ordered and received food; that she began eating; that the counter was almost full; that no Negroes were there. That a man came up to her and told [fol. 55] her she was not an invited guest and that she would have to leave. That he told her she was antagonizing customers. That the police said, "Let's go." That several students at North Carolina College had prior thereto come in and were sitting on either side of her; that she had offered one of them some food. That Mr. Boger did not offer to give her her money back. That she is a member of the white race, and had not prior to this occasion eaten at the lunch counter.

Defendants have further offered evidence which in substance tends to show that Callis N. Brown is a senior at

North Carolina College; that he went to Kress' Store on this occasion; that he bought a comb. That prior to February 8, 1960, he attended Kress' Store on many occasions. That he had not been to the stand-up luncheon section on May 6th—had not been to the stand-up luncheon section. That on May 6, after he made a purchase, he went downstairs and sat at the lunch counter; that Mr. Boger told him to leave, and he, Brown, asked Mr. Boger if he was the manager, and he did not answer. And that Captain Seagroves then took him to the Police Station. That it was late in May before a warrant was read to him. That he is a member of the Negro race.

The defendants have further offered evidence which in substance tends to show that Frank Coleman is enrolled as a graduate student at Duke University; that he is a member of the white race. That on May 6th, he went to Kress' Store; that he had not been there prior to this date. That he bought a Mother's Day card and then went down to the lunch counter. That he had a friend with him by the name of Bob, and that Bob is a Negro. That the waitress told him she would not serve him and that she didn't have to explain the reasons when he asked for a reason. That Mr. Boger asked him to leave and told him that they were not invited guests, and he asked Mr. Boger how they sent out invitations and how they got invitations; [fol. 56] That he did not leave, that he sat there. That, later, Mr. Boger returned with the police officer; that he saw Mr. Boger as he would come up to the others who were there, some of the people who were there, and that he saw him tap them on the shoulder and he would ask them to leave, and that they would tell him they were not going to leave until they were served, and that the officer would then tell them that they were being arrested for trespass.

Defendants have further offered evidence which in substance tends to show that Shirley Mae Brown is a member of the Negro race and is a sophomore at North Carolina College. That on this date she went to Kress' and made a purchase of some rubber bands; that afterwards she went downstairs to the lunch counter; that a white man from Duke, that she doesn't know his name, purchased some food

and gave it to her; that a waitress snatched it up. That Mr. Boger told her that "this lunch counter is open for employees and invited guests," and that she said that she would leave as soon as she finished eating the sandwich. That he did not tell her that he was the manager or that he even worked there.

The defendants have further offered evidence which, in substance, tends to show that John Thomas Avent is a member of the Negro race, and that he went to Kress' Store on this date; that he bought a pencil. That he then went downstairs to the lunch counter and sat down. That Mr. Boger came; that he did not know him at that time, but Mr. Boger came and said, "I'm sorry, I'm going to have to ask you to leave. That the counter is only open for invited guests, and you are not invited guest." That the policeman came and told him at that time and pointed toward the other students, and that he went over there where they were.

That's what some of the evidence for the defendants tends to show. What it does show, if anything, is for you [fol. 57] to say and determine.

I did not attempt to recapitulate and summarize all the evidence in the case, but I instruct you that when you retire to your room to consider and make up your verdict in the case, that it is your duty to remember and consider all of the evidence in the case, whether it has been called to your attention by the Court or not. I also instruct you that if your recollection of what the evidence was differs from what counsel for defendants, Solicitor for the State, or even the Court says the evidence was, that it is your duty to disregard what the lawyers and the Court say the evidence was, and rely upon and be governed entirely and solely upon your own recollection of what the evidence in the case was.

Gentlemen, we have a statute in this State, the pertinent parts thereof read as follows: If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor.

To constitute trespass on the lands of another, after notice or warning under this statute, three essential in

gredients must co-exist. First, the land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession. The accused must enter upon the land intentionally. And, third, the accused must do this after being forbidden to do so by the prosecutor, or someone acting for and on behalf of the prosecutor.

Although the State may prove beyond a reasonable doubt, in a prosecution under this section, that the accused intentionally entered upon the land in actual or constructive possession of the prosecutor, after being forbidden to do so by the prosecutor, and thus establish as an ultimate fact that the accused entered the locus in quo without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right. When an accused seeks to excuse an entry [fol. 58] without legal right as one taking place under a bona fide claim of right he must do two things: First, that he believed that he had a right to enter, and, second, that he had reasonable grounds for such belief.

I instruct you that if the defendants in this case, or either of them, in good faith entered the part of the building of S. H. Kress and Company, from which they were ordered to leave, if they were ordered to leave, for the purpose of ordering a meal, and other goods and merchandise sold there, and believed in good faith and had reasonable grounds to believe that they had a legal right to enter or remain and be in that portion of the building for that purpose, then it would be your duty to acquit the defendants or such of the defendants as fall within that explanation.

Now, gentlemen, the law that the Court has just read to you, or some of it, and all of it, does not mean that the burden of proof ever shifts in this case. The burden is always upon the State to satisfy you of the guilt of the defendants, and each of them, beyond a reasonable doubt. But the law does permit the defendants, and each of them, to offer evidence either by presenting witnesses or cross examination of State's witnesses as to their good faith in claiming a right to enter upon the land. And they do not have to establish this beyond a reasonable doubt; if they undertake to assert such a defense; they do not have to establish it by the greater weight of the evi-

dence. It is sufficient if the evidence on this point raises in your mind a reasonable doubt as to their guilt.

So, gentlemen, before you may convict these defendants, or either of them, the State must satisfy you from the evidence beyond a reasonable doubt of three things: first, it must satisfy you beyond a reasonable doubt, that the land, including the portion of the building referred to in the [fol. 59] evidence in this case, was on May 6, 1960, the land of S. H. Kress and Company in the sense that it was at that time in its actual or constructive possession. And I instruct you that one is in actual possession of real estate when he is present thereon and has the legal right to and does exercise dominion and control over the same. One is in constructive possession of real estate when he has the legal right to exercise dominion and control over the same, though absent therefrom.

The State must satisfy you, in the second place, beyond a reasonable doubt that the accused, and each of them, entered upon the land intentionally. Intent, in law, is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of act, willing and electing to do it. Intent is an act or emotion of the mind, seldom if ever capable of direct or positive proof, but is arrived at by such just and reasonable deduction from the acts and facts proven as the guarded judgment of a reasonable, prudent and cautious man would ordinarily draw therefrom. It is usually shown only by the acts, declarations and circumstances known to the party charged with the intent. The word "intentionally" in this case embraces the phrase used in the statute "without license therefor." This expression "without license therefor" means without permission or invitation, express or implied; without legal right or without bona fide claim of right.

And the State must satisfy you beyond a reasonable doubt, in the third place, that the defendants, and each of them, entered after having been forbidden to do so by one having right of possession of said land. If a person with permission or invitation, express or implied, and with

out legal right or bona fide claim of right, intentionally enters upon the land of another and, after entering thereon is unconditionally ordered to leave and get off of the property by one in the legal possession thereof; and if [fol. 60] he refuses to leave and remains on the land, he is a trespasser from the beginning, and the statute read to you by the Court applies, and he is deemed to have been forbidden to enter the property, even though the original entrance was peaceful and authorized. However, if a person who enters by permission or invitation does not unlawfully, willfully and intentionally refuse to leave, he or she would not be guilty. And in this case, if any of these defendants was requested or ordered to leave by a duly authorized agent of S. H. Kress and Co., and S. H. Kress and Company was in possession of the premises, and ordered to leave the premises in question in this case, and such defendant did not thereafter have a reasonable time and opportunity to leave before being arrested for trespass, he or she would not be guilty of such trespass as charged in the bills of indictment herein.

The word "entry," gentlemen, as used in the statute that the Court has read to you is synonymous with the word "trespass." It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession.

I also instruct you that a person who has the legal right to possession of land is not required to explain or to give a reason for forbidding another to enter his land, and is not required to explain or give a reason for unconditionally ordering another to leave and get off of his land. And if the other has no license therefor, that is, has no permission or invitation, express or implied, has no legal right to enter or remain, or does not in good faith claim a right to enter or remain, I instruct you that the right to keep others off and to order others off of land privately owned is part and parcel of the owner's right to possession, dominion and control.

I instruct you, gentlemen, that under the evidence in this [fol. 61] case and the law applicable thereto you may, as to each of these defendants, return one of two verdicts.

You may find him or her guilty or you may find him or her not guilty, just as you find the facts to be from all of the evidence in the case, applying thereto the law as given you by the Court. The State contends that you ought to find each of the defendants guilty. The defendants contend, and each of them contends, that you ought not to find him or her guilty.

I further instruct you, gentlemen, that all persons so far as our law is concerned are equal before the law, and you are not to consider, though there has been a great deal in this case said about race, you will not consider the racial extraction of the defendants in arriving at a verdict in this case. Our Court makes no distinction between persons, whether they are rich or poor, or regardless of what their race may be, or what their circumstances in life are. You are to decide this case strictly upon the evidence and under the rules of law which the Court has given to you for your guidance.

Gentlemen, I instruct you that you may convict all of the defendants, you may convict one and not convict the other six, you can convict any number and acquit the remainder, or you may find them all not guilty, just as you find the facts to be from all the evidence in the case, applying thereto the law as given you by the Court.

Gentlemen, an agent is one who acts for or in the place of another by authority from him, one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it.

Gentlemen, when you come to consider the evidence and the weight you will give to the testimony of the different [fol. 62] witnesses, the Court instructs you that it is your duty to carefully consider and to scrutinize the testimony of a defendant when he or she testifies in his or her own behalf. And in passing upon the testimony of such, the jury ought to take into consideration the interest the witness has in the result of the action. But the Court instructs you that the law requiring to do so does not reject or impeach such evidence, and if you believe that such witness has sworn to the truth, you would give to his or her testi-

mony the same weight you would to that if any disinterested or unbiased witness. In passing upon the testimony of anyone, the jury ought to take into consideration the intelligence manifested by the witness while on the stand, the fairness or want of fairness, the reasonableness or unreasonableness, his interest, if any, in the result of the action, his bias or prejudice, if any, his means of knowing the facts to which he testified, and give to each witness such weight as to you he seems entitled to receive. You may believe all that a witness has said or none of what a witness has said, you may believe part of what a witness has said and disbelieve a part of what a witness has said. Gentlemen, this is not a question of sympathy for anyone, nor is it a question of prejudice against anyone. You are sworn jurors with a duty to perform, and that duty is to take the evidence as it came from the mouths of the sworn witnesses, and to take the law as given you by the Court, and find a verdict in this case that speaks the truth.

So, gentlemen, I come to the final portion of the charge, and I will have to repeat it as to each of the defendants.

So, I instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and [fol. 63] that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger, as such agent, unconditionally ordered the defendant John Thomas Avent to leave the said lands of S. H. Kress and Company, and further, that in so doing he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in

both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had legal right of possession of said lands, as that has been explained to you, and that said defendant John Thomas Avent had no bona fide claim of right thereto; then in that event it will be your duty to return a verdict of guilty as charged as to the defendant John Thomas Avent. If you fail to so find, it will be your duty to return a verdict of not guilty, or if upon a fair and impartial consideration of all the facts and circumstances in the case you have a reasonable doubt as to his guilt, it's your duty to give him the benefit of the doubt and acquit him.

Gentlemen, if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent uncon- [fol. 64] ditionally ordered the defendant Callis Napolis Brown to leave the said lands of S. H. Kress and Company, and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that the said defendant, Callis Napolis Brown, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to Callis Napolis Brown as

charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it's your duty to give him the benefit of the doubt and acquit him.

I further instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Shirley Mae Brown to leave the said lands of S. H. Kress and Company, and further, that in doing so he was acting as the [fol. 65] agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and, after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Shirley Mae Brown, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to Shirley Mae Brown as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to her guilt, it is your duty to give her the benefit of the doubt and acquit her.

If you find from the evidence, gentlemen, and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Frank McGill Coleman to leave the said lands of S. H. Kress and Company, and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of said S. H. Kress and Company, and that said defendant entered and re-[fol. 66] mained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Frank McGill Coleman, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to Frank McGill Coleman as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it is your duty to give him the benefit of the doubt and acquit him.

I also instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such

agent unconditionally ordered the defendant Joan Harris Nelson to leave the said lands of S. H. Kress and Company; and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands intentionally, as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been forbidden to do so by W. K. Boger and after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Joan Harris Nelson, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to the defendant Joan Harris Nelson, as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to her guilt, it is your duty to give her the benefit of the doubt and acquit her.

[fol. 67]

I further instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Donovan Phillips to leave the said lands of S. H. Kress and Company; and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company, and that said defendant entered and remained upon said lands in-

tentionally as that term has been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been ordered by [fol. 68] him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Donovan Phillips, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to the defendant Donovan Phillips as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or if, upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it is your duty to give him the benefit of the doubt and acquit him.

I further instruct you, gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 6th day of May, 1960, that S. H. Kress and Company owned the land and building in question herein in the sense that it was at that time in its actual or constructive possession, and that W. K. Boger was the agent of the said S. H. Kress and Company, and that on May 6, 1960, said W. K. Boger as such agent unconditionally ordered the defendant Lacy Carrole Streeter to leave the said lands of S. H. Kress and Company; and further, that in doing so he was acting as the agent of said S. H. Kress and Company, and that said W. K. Boger was known by said defendant to be the legal agent of the said S. H. Kress and Company . . .

Gentlemen, it has been called to my attention that I have called the defendant Lacy Carrole Streeter, throughout, Lacy Streeter Carrole. It is an inadvertence on my part, gentlemen. I instruct you that when I have said Lacy Streeter Carrole, I was referring and have referred at all times and you shall take it to mean the defendant Lacy Carrole Streeter.

[fol. 69] . . . And that said defendant entered and remained upon the said lands intentionally, as that term has

been explained to you; and further, that the defendant intentionally entered and intentionally remained thereon after having been ordered by him to leave, and that said W. K. Boger was acting in both instances as the agent of said S. H. Kress and Company, and that said S. H. Kress and Company was in possession of and had the legal right of possession of said lands, as that has been explained to you, and that said defendant, Lacy Carrole Streeter, had no bona fide claim of right thereto, then in that event it will be your duty to return a verdict of guilty as to the defendant Lacy Carrole Streeter as charged in the bill of indictment. If you fail to so find, it will be your duty to return a verdict of not guilty, or if, upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to his guilt, it is your duty to give him the benefit of the doubt and acquit him.

You may retire, gentlemen, and say how you find as to each defendant.

Exception #11

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IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTIONS TO SET ASIDE VERDICT, FOR NEW TRIAL AND IN ARREST OF JUDGMENT AND DENIALS THEREOF

Exception #12:

Mr. Marsh: Motion to set aside the verdict as being contrary to the weight of the evidence.

Court: Motion overruled.

Defendants and each of them except.

Exception #12.

Exception #13:

Mr. Marsh: We move for new trial for errors committed during the trial.

Exception #13.

Exception #14:

Mr. Marsh: We make a motion in arrest of judgment.

Court: Defendants, and each of them, move in arrest of judgment. Motion overruled. Defendants and each of them except.

Exception #14.

[fol. 70]

IN THE SUPERIOR COURT OF DURHAM COUNTY

ASSIGNMENTS OF ERROR

The defendants assign for error the following:

Assignment of Error 1: The action of the Court, as set out in Exception #1 (R pp 9-12), in overruling Negro Defendants' Motions to Quash.

Assignment of Error 2: The action of the Court, as set out in Exception #2 (R pp 12-14), in overruling white defendants' Motions to Quash.

Assignment of Error 3: The action of the Court, as set out in Exception #3 (R pp 24-25), in permitting Capt. R. J. Cannady to testify, as follows:

Q. You know that Mr. Boger was the manager of the store?

A. Yes, sir.

Q. And they knew that he was and had been so told by you and by him?

A. Yes, sir.

Q. That he was manager and in charge?

A. Yes, sir.

Mr. Marsh: I object. I can't hear the questions and I can't hear the answers.

Court: Speak a little louder then, Mr. Solicitor and Mr. Witness.

Mr. Marsh: I want her to read back the last questions that Mr. Murdock asked.

Court: Read them to him, Miss Nelda.

Reporter: "Q. You knew that Mr. Boger was the manager of the store? A. Yes, sir. Q. And they knew that he was and had been so told by you and by him?"

Mr. Marsh: Now, I object to as leading the witness.

Court: The objection comes too late. Put in this. The objection comes after the witness has answered the question and it comes too late.

Mr. Marsh: I couldn't hear the question, may it please the Court.

[fol. 71] Court: Well, there are five others sitting there and there was no objection made.

Mr. Marsh: Motion to strike the answer relative to the last question asked by Mr. Murdock.

Assignment of Error #4: The action of the Court, as set out in Exception #4 (R pp 26-30), in overruling Negro defendants' motions for judgment as of nonsuit at the close of all of the evidence.

Assignment of Error 5: The action of the Court, as set out in Exception #5 (R pp 30-33), in overruling white defendants' motions for judgment as of nonsuit at the close of all of the evidence.

Assignment of Error 6: The action of the Court, as set out in Exception #6 (R p 34), in overruling defendants' further motion.

Assignment of Error 7: The action of the Court, as set out in Exception #7 (R pp 34-35), in overruling defendants' further motion.

Assignment of Error 8: The action of the Court, as set out in Exception #8 (R p 35), in overruling defendants' further motion.

Assignment of Error 9: The action of the Court, as set out in Exception #9 (R p 46), in refusing to allow defendants' counsel to ask the following question on direct examination:

Q. At the time that you went to the lunch counter on May 6, 1960, did you feel and believe that you had a right to service at this lunch counter?

Assignment of Error 10: The action of the Court, as set out in Exception #10 (R p 51), in overruling defendants' motion to quash the indictments and motions for dismissal as of nonsuit made at the close of all of the evidence.

[fol. 72], Assignment of Error 11: The action of the Court, as set out in Exception #11 (R pp 51-69), in charging the jury as appears on Record pages 51 through 69.

Assignment of Error 12: The action of the Court, as set out in Exception #12 (R p 69), in overruling defendants' motion to set aside the verdict as being contrary to the greater weight of the evidence.

Assignment of Error 13: The action of the Court, as set out in Exception #13 (R p 69), in overruling defendants' motion for a new trial for errors committed during the trial.

Assignment of Error 14: The action of the Court, as set out in Exception #14 (R p 69), in overruling defendants' motion in arrest of judgment.

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IN THE SUPERIOR COURT OF DURHAM COUNTY

STIPULATIONS

I. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the Court was duly and properly organized.

II. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that before a plea was entered as to the Bill of Indictment against each of the Negro Defendants, the written motion, as appears on Record page

10, to quash the Bill of Indictment, was made separately for each of the Negro Defendants.

[fol. 73] III. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that before the plea was entered as to the Bill of Indictment against each of the white defendants, the written motion, as appears on Record page 12, to quash the Bill of Indictment, was made separately for each of the white defendants.

IV. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the written motion for nonsuit, as appears on Record page 26 was made separately, as to each of the Negro defendants in the case.

V It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the written motion for nonsuit, as appears on Record page 30, was made separately, as to each of the white defendants in the case.

VI. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H. Murdock), Solicitor for the Tenth Solicitorial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the Exhibits A through F constitute purchases made by each defendant who testified in the case, as appear in the record.

[fol. 74] VII. It is hereby stipulated and agreed by and between the Solicitor for the State (Honorable William H.

Murdock), Solicitor for the Tenth Soliciforial District, and Counsel for the defendants (F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., and M. Hugh Thompson) that the written motions to quash the indictments as appears on Record page 10, et seq., and motions for nonsuit, as appears on Record page 26, et seq., were made at the close of all the evidence.

VIII. It is hereby stipulated by Counsel for defendants that defendants made no oral exception to the Judge's ruling on their motion to strike which ruling constitutes exception three (3) of this record; however, defendants feel that under our rules an exception was deemed to have been made to the Judge's ruling.

William A. Marsh, Jr., of Counsel for Defendants.

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IN THE SUPERIOR COURT OF DURHAM COUNTY

STIPULATION AS TO CASE ON APPEAL

The foregoing is tendered by the defendants as their case on appeal to the Supreme Court. This 3rd day of October, 1960.

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson II, F. B. McKissick, L. C. Berry, Jr., Attorneys for Defendant Appellants.

Service of the foregoing case on appeal and assignments of error accepted, this 5 day of October, 1960.

W. H. Murdock, Solicitor.

It is further stipulated that the service of this case on appeal and the counter-case on appeal were made in apt time.

This 5th day of October, 1960.

William A. Marsh, Jr., M. Hugh Thompson, C. O. [fol. 75] Pearson, W. G. Pearson, II, F. B. McKissick, L. C. Berry, Jr., Attorneys for Defendant Appellants.

W. H. Murdock, Solicitor.

It Is Stipulated And Agreed by and between the Solicitor for the State of North Carolina, William H. Murdock, and the Attorneys for defendants, F. B. McKissick, C. O. Pearson, W. G. Pearson, William A. Marsh, Jr., L. C. Berry, Jr., M. Hugh Thompson, that the foregoing 76 pages, together with this page, shall constitute the case on appeal to the Supreme Court in this cause.

W. H. Murdock, Solicitor, William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, II, F. B. McKissick, L. C. Berry, Jr., Attorneys for Defendant Appellants.

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[fol. 76] [File endorsement omitted]

IN THE SUPREME COURT OF NORTH CAROLINA

Fall Term 1960

No. 654—Durham

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STATE

v.

JOHN THOMAS AVENT

---

STATE

v.

LACY CARROLE STREETER

---

STATE

v.

FRANK MCGILL COLEMAN

---

---

STATE

v.

SHIRLEY MAE BROWN

---

STATE

v.

DONOVAN PHILLIPS

---

STATE

v.

CALLIS NAPOLIS BROWN

---

STATE

v.

JOAN HARRIS NELSON

---

OPINION—January 20, 1961

Appeal by defendants from Mallard, J., 30 June 1960 Criminal Term of Durham.

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

[fol. 77] The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner,

being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was [fol. 78] operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They

refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department tes- [fol. 79] tified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H.

Kress and Company in its luncheonette department. All are members of a student organization, which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service. The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

[fol. 80] The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friend, Bob Markham, a Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., for Defendants, Appellants.

Parker, J. Each defendant—five of whom are Negroes and two members of the White race—before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. S. v. Perry, 248 N. C. 334, 103 S. E. 2d 404; Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, §141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corpora- [fol. 81] tion, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cook-shop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat." S. v. Shoaf, 179 N. C. 744, 102 S. E. 705. To the same effect see, 29 Am. Jur. (1960), Innkeepers, §9, p. 12. In Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 27 N. W. 586, the Court said: "A 'restaurant' has no more defined meaning, (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere

eating-house or cookshop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed o. the premises is subordinate." Quoted with approval in M. higan Packing Co. v. Messaris, 257 Mich. 422, 241 N. W. 236, and restated in substance in 43 C. J. S., Innkeepers, §1, subsection b, p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to [fol. 82] make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. S. v. Clyburn, 247 N. C. 455, 101 S. E. 2d 295; Williams v. Howard Johnson's Restaurant, 268 F. 2d 845; Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4th Circuit 27 December 1960, —— F. 2d ——; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d 906; Wilmington Parking Authority v. Burton (Del.), 157 A. 2d 894; Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, §21; Powell v. Utz, 87 F. Supp. 811; and Annotation 9 Am. & Eng. Ann. Cas. 69—statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In Alpaugh v. Wolverton, *supra*, the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve every one who applies to him. In the ab-

sence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In Boynton v. Virginia, 5 December 1960, —— U. S. ——, ——L. Ed. ——, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In S. v. Clyburn, *supra*, the defendants were tried on similar warrants charging that each defendant unlawfully [fol. 83] entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream Company, retailing ice cream and sandwiches. The building in which they did business is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and they were arrested by a police officer of the city of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the patrons he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens

County Jockey Club, 72 N. E. 2d 697 (N. Y.); Terrell Wells Swimming Pool v. Rodriguez, 182 S. W. 2d 824 (Tex.); Booker v. Grand Rapids Medical College, 120 N. W. 589 (Mich.); Younger v. Judah, 19 S. W. 1109 (Mo.); Goff v. Savage, 210 P. 374 (Wash.); De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818 (Utah); Brown v. Meyer Sanitary Milk Co., 96 P. 2d 651 (Kan.); Horn v. Illinois Cent. R. Co., 64 N. E. 2d 574 (Ill.); Coleman v. Middlestaff, 305 P. 2d 1020 (Cal.); Fletcher v. Coney Island, 136 N. E. 2d 344 (Ohio); Alpaugh v. Wolverton, 36 S. E. 2d 906 (Va.). The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

[fol. 84] In an Annotation in 9 A. L. R., p. 379, it is said: "It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, Brookside Pratt Min. Co. v. Booth, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417, and Annotation in 33 A. L. R. 421.

This is said by Holmes, J., for the Court in Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256, 60 L. Ed. 984, 987, a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company: "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed: But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes . . . ."

None of the cases cited in defendants' brief are applicable to the situation which obtain in the instant cases. For instance, Cooper v. Aaron, 358 U. S. 1, 3 L. Ed. 2d 5—public education; Boman v. Birmingham Transit Co., 280 F. 2d 531—public transportation; Valle v. Stengel, 176

F. 2d 697—a case in respect to an amusement park in the State of New Jersey, which State has a statute, R. S. 10:1-3, N. J. S. A., providing that no proprietor of a place of public resort or amusement, " . . . shall directly or indirectly refuse, withhold from, or deny to, any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed or color," R. S. 10:1-6, N. J. S. A.

[fol. 85] "The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." 11 Am. Jur., Constitutional Law, 335.

G. S. 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? S. v. Baker, 231 N. C. 136, 56 S. E. 2d 424.

G. S. 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable

and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute is also color blind. Its purpose is "to protect actual possession only." S. v. Baker, *supra*. We have repeatedly held in applying [fol. 86] G. S. 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonymous with the word "trespass." S. v. Clyburn, *supra*.

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G. S. 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, §17, of the State Constitution. S. v. Clyburn, *supra*.

Defendants, in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, §17, of the State Constitution, and further that G. S. 14-134 and G. S. 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in Shelley v. Kramer, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private

conduct, however discriminatory or wrongful." This in-
[fol. 87] terpretation has not been modified: Collins v. Hardyman, 341 U. S. 651, 95 L. Ed. 1253; District of Columbia v. Thompson Co., 346 U. S. 100, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—, and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. 14-134 and G. S. 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. 14-134 and G. S. 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the defendants guaranteed to them by Article I, § 17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right
[fol. 88] to have his land free from unlawful invasion by

Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, §76, p. 167; 6 C. J. S., Assault and Battery, §20, (2). This is said in 4 Jur., Assault and Battery, §76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, §78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C. J. S., Assault and Battery, p. 821. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (Shelley v. Kramer, [fol. 89] 334 U. S. 1, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In Slack v. Atlantic White Tower System, Inc., *supra*, the Court said: "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In S. v. Cooke, 248 N. C. 485, 103 S. E. 2d 846, the defendants were convicted and sentenced on a charge that they did "unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. Wolfe v. North Carolina, 364 U. S. 177, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question of State action referred to. It seems that if the United States Supreme Court had thought that the arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a State has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be nonsuited, because the demands that they leave Kress' store, their arrest by an officer of the City of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of [fol. 90] free speech, and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in Kovacs v. Cooper, 336 U. S. 77, 93 L. Ed. 513, 10 A. L. R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. The Saia Case recognized that in this field by

stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, Schenck v. United States, 249 US 47, 52, 63 L ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G. S. 14-134 and G. S. 14-126.

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Com- [fol. 91] pany contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in S. v. Clyburn, *supra*, in Slack v. Atlantic White Tower System, Inc., *supra*, and in Williams v. Howard Johnson's Restaurant, *supra*; and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G. S. 14-134

is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, §17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in that W. K. Boger did not identify himself when he asked them not to enter the luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G. S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. S. v. Corl, 250 N. C. 252, 108 S. E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

[fol. 92]

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made at the close of all the evidence. G. S. 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used

to explain or make clear the State's evidence, (S. v. Nall, 239 N. C. 60, 79 S. E. 2d 354), as we are required to do in passing upon defendants' motions made at the close of all the evidence, it tends to show that all the defendants without legal or constitutional right or bona fide claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact, that the violations by all defendants of G. S. 14-126 and G. S. 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all, of the Negro defendants in urging people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all, of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of [fol. 93] all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. S. v. Dillard, 223 N. C. 446, 27 S. E. 2d 85, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed to explain adequately the law in the case. Citing authority. The assignment must particularize and point

out specifically wherein the court failed to charge the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. Barnette v. Woody, 242 N. C. 424, 88 S. E. 2d 223; Watters v. Parrish, 252 N. C. 787, 115 S. E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N. C. 544; S. v. Atkins, 242 N. C. 294, 87 S. E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G. S. 1-180, and in particular instructed the jury to the effect that if the defendants entered the luncheonette [fok 94] department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. S. v. Clyburn, *supra;* S. v. Fisher, 109 N. C. 817, 13 S. E. 878. This Court said in S. v. Crawley, 103 N. C. 353, 9 S. E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient—he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. S. v. Bryson, 81 N. C. 595." This Court said in S. v. Wells, 142 N. C. 590, 55 S. E. 210: "True we have held in several well-considered decisions, that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had

reasonable grounds for such belief. S. v. Glenn, 118 N. C., 1194; S. v. Durham, 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

[fol. 95] All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution.

*No Error.*

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[fol. 96]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

---

STATE

v.

JOHN THOMAS AVENT, LACY CARROLE STREETER, FRANK McGILL COLEMAN, SHIRLEY MAE BROWN, DONOVAN PHILLIPS, CALLIS NAPOLIS BROWN and JOAN HARRIS NELSON

---

CLERK'S CERTIFICATE

Appeal docketed 8 November 1960.

Case argued 29 November 1960.

Opinion filed 20 January 1961.

Final judgment entered 20 January 1961.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 6th day of March, 1961.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina.

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[fol. 97]

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 4th, 1961.

Earl Warren, Chief Justice of the United States.

Dated this 4th day of April, 1961.

[fol. 98]

SUPREME COURT OF THE UNITED STATES

No. 85—October Term, 1961

JOHN THOMAS AVENT, *et al.*, Petitioners,

vs.

NORTH CAROLINA

ORDER ALLOWING CERTIORARI—June 25, 1962.

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

Office-Supreme Court, U.S.
FILED
MAY 4 1961
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1961

No. [redacted]

JOHN THOMAS AVENT, CALLIS NAPOLIS BROWN, SHIRLEY MAE BROWN, FRANK McGILL COLEMAN, JOAN HARRIS NELSON, DONOVAN PHILLIPS, and LACY CARROLE STREETER,

*Petitioners,*

—v.—

STATE OF NORTH CAROLINA.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

# Supreme Court of the United States

October Term, 1960

No. .....

JOHN THOMAS AVENT, CALLIS NAPOLIS BROWN, SHIRLEY MAE BROWN, FRANK McGILL COLEMAN, JOAN HARRIS NELSON, DONOVAN PHILLIPS, and LACY CARROLE STREETER,

*Petitioners,*

—v.—

STATE OF NORTH CAROLINA,

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above-entitled cause on January 20, 1961.

### Citations to Opinions Below

The opinion of the Supreme Court of North Carolina is reported at 118 S. E. 2d 47 and is set forth in the appendix attached hereto, *infra*, p. 1a.

### Jurisdiction

The judgment of the Supreme Court of North Carolina was entered January 20, 1961 (Clerk's certificate attached hereto, *infra*, App., p. 22a).[1] On April 4, 1961, time for

[1] The Clerk's certificate recites that final judgment was entered on January 20, 1961. The record, however, contains no actual form

filing a petition for writ of certiorari was extended by the Chief Justice to and including May 4, 1961. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here, denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

## Questions Presented

1. Whether the due process and equal protection clauses of the Fourteenth Amendment suffer the state to use its executive and judiciary to enforce racial discrimination in a business that has for profit opened its property to the general public while using the state criminal trespass statute to enforce racial discrimination within the same property.

2. Whether, where the criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited, and their conduct violated no standard required by the plain language of the law, the conviction offends the due process clause of the Fourteenth Amendment.

3. Whether the decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to liberty of expression.

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of judgment. Upon inquiry to the Clerk, he informed counsel for petitioners that the judgment is a paper prepared by the Clerk. Because stay of execution was obtained before he prepared this paper, he did not actually complete it and place it in the record.

## Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves North Carolina General Statutes, §14-134:

> Trespass on land after being forbidden. "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

## Statement

This is one of 2 cases filed here today (the other is *State* v. *Fox*, No. 442, Supreme Court of North Carolina, Fall Term, 1960 reported at 118 S. E. 2d 58) involving whether a state may use its criminal trespass statute to enforce racial segregation according to the customs of the community in one portion of a commercial establishment otherwise open to the public without segregation. The issues are similar to those presented by *Garner*, *Briscoe* and *Hoston* v. *State of Louisiana*, Nos. 617, 618 and 619, respectively, certiorari granted March 20, 1961, in which a state employed a statute forbidding disturbing the peace for this purpose.

May 6, 1960, petitioners, five Negro students from North Carolina College, Durham, North Carolina (R. 35, 40, 44-45, 48, 49) and two white students from Duke University, Durham (R. 42, 47) were customers of Kress's Department Store, Durham. The store, in a five story building (R. 20)

has approximately fifty counters (including a "stand-up" lunch counter) which serve Negroes and whites without racial distinction (R. 22). No sign at the store's entrance barred or conditioned Negro patronage (R. 22). Petitioners made various purchases (R. 36, 40, 43, 47, 48, 49), as some of them had in the past as regular customers (R. 36, 41, 43, 45, 48), and in time went to the basement lunch counter. Here a sign stated "Invited Guests and Employees Only" (R. 21, 23). No writing further elucidated this sign's meaning, but the manager testified that although no invitations as such were sent out, white persons automatically were considered guests; Negroes and whites accompanied by Negroes were not (R. 22-23). The counter was bordered by an iron railing (R. 21) and petitioners entered through the normal passageway (R. 38).

Some of the petitioners had requested and had been denied service on previous occasions at this counter (R. 38). However, they "continued to try" and at this time again "went there for service" (R. 38). They expected to be served at the basement lunch counter because they had been served upstairs (R. 50). They had not been arrested previously for trespassing and were not arrested for trespassing upon entering the store through its main doors. Nor did they expect to be arrested for trespassing on this occasion (R. 38, 44, 50).

Petitioners were participants in an informal student organization which opposed racial segregation (R. 40), and felt they had a right to service at Kress's basement lunch counter after having been customers in other departments (R. 40, 42, 50; and see, R. 46 (objection to question sustained)). Some had picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (R. 37, 42, 50).

The manager again declined to serve them. He stated that if Negroes wanted service they might obtain it at the back of the store (R. 24), or at a stand-up counter upstairs (R. 22), and asked them to leave (R. 21).

"It is the policy of our store to wait on customers dependent upon the custom of the community" (R. 22), he testified. "It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs 'Invited Guests and Employees Only'" (R. 23).

When petitioners remained seated awaiting service, the manager called the police to enforce his demand (R. 21). An officer promptly arrived and asked petitioners to leave (R. 21). Upon refusal the officer arrested them for trespassing (R. 21, 4). Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner

> "with force and arms, . . . . did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store . . . said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that . . . [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state." (R. 2, 3, 4, 5, 6, 7, 8.)

Each indictment identified each petitioner as "CM" (colored male) (R. 3, 4, 7, 8), "WM" (white male) (R. 5), "CF" (colored female) (R. 6), or "WF" (white female) (R. 9). Defendants made motions to quash the indictment (see *infra*, pp. 6-7), which raised defenses under the Fourteenth Amendment to the United States Constitution. These were denied (R. 10-12).

Petitioners were tried June 30 and July 1, 1960 (R. 20). They pleaded not guilty (R. 15) and were found guilty (R. 15). Various federal constitutional defenses (see *infra*, pp. 7-9), were made throughout and at the close of the trial, but were overruled. Petitioners Coleman, Phillips and Callis Napolis Brown were sentenced to thirty days imprisonment in the common jail of Durham County to work under the supervision of the State Prison Department (R. 16, 17, 18). Petitioner Streeter was sentenced similarly to twenty days (R. 19). Petitioner Avent was sentenced to fifteen days in the Durham County jail (R. 15). Prayer for judgment was continued in the cases of petitioners Shirley Mae Brown and Joan Harris Nelson (R. 16-17).

Error was assigned, again raising and preserving federal constitutional defenses (see, *infra*, pp. 9-11), and the case was heard by the Supreme Court of North Carolina which affirmed on January 20, 1961 (Clerk's certificate following court's opinion).

## How the Federal Questions Were Raised and Decided

Prior to trial petitioners filed motions to quash the indictment.

The Negro petitioners alleged that G. S. 14-134 was unconstitutionally applied to them in that while using facili-

ties of S. H. Kress and Company, which was licensed by the City and County of Durham to carry on business open to the general public, they were charged with trespass on account of race and color contrary to the equal protection and due process clauses of the Fourteenth Amendment; that G. S. 14-134 denied due process of law secured by the Fourteenth Amendment in that it was unconstitutionally vague; that G. S. 14-134 was unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment because the arrest was made to aid S. H. Kress and Company, which was open to the public, in enforcing its whims and caprices against serving members of the Negro race on the same basis as members of other races, all of whom had been invited to use said establishment; that the defendants who were on the premises of S. H. Kress and Company pursuant to an invitation to the general public, were denied the use of said establishment solely because of race and color, and were arrested for attempting to exercise the right of invitees to equal treatment, contrary to the due process and equal protection clauses of the Fourteenth Amendment (R. 10-12).

The white petitioners made identical allegations except that instead of stating that they were denied constitutional rights because of race, they charged that they were indicted because of association with the Negro petitioners (R. 12-14).

The motions to quash were denied and exception was taken thereto (R. 12, 14)

Following the State's evidence the Negro petitioners made Motions for Dismissal as of Nonsuit (R. 26-35). These alleged that petitioners entered S. H. Kress's store to shop and use its facilities; that they had purchased other articles in the store; had been trading there for a long time prior to arrest; had entered the store in orderly fash-

ion; and were arrested when they took seats and requested service at the lunch counter. The motions prayed for nonsuit pursuant to the Fourteenth Amendment in that enforcement of G. S. 14-134 in these circumstances was state action forbidden by the equal protection and due process clauses of the Fourteenth Amendment; that defendants were denied rights secured by the Civil Rights Act of 1866 which assures to all citizens the same right in every state and county as is enjoyed by white citizens to purchase personal property; that S. H. Kress and Company was operating under a license of the City of Durham and, therefore, petitioners' arrest at the owner's behest violated the rights secured by the Fourteenth Amendment to the Constitution of the United States; that G. S. 14-134 denied due process of law secured by the Fourteenth Amendment in that it was vague; that G. S. 14-134 denied due process of law and the equal protection of the laws in that it was applied to carry out the whims and caprices of the proprietor against members of the Negro race; and that petitioners were denied rights secured by the due process and equal protection clauses of the Fourteenth Amendment by being arrested for attempting to exercise rights to equal treatment as invitees of S. H. Kress and Company. These motions were denied and exception was taken thereto (R. 30).

Similar motions filed on behalf of the white petitioners alleged that they had been denied these rights because of association with Negroes (R. 30-33). These motions were denied and exception was taken thereto (R. 33).

Additional Motions for Dismissal as of Nonsuit alleged that S. H. Kress was performing an economic function invested with the public interest; that petitioners were peacefully upon the premises; that there was no basis for the charge other than an effort to exclude petitioners from

the store solely because of race; that petitioners were at the same time excluded from equal service at the preponderant number of other eating establishments in the City of Durham, and that the charge recited by the indictment denied to petitioners due process of law and the equal protection of the laws secured by the Fourteenth Amendment.

The motion also alleged that petitioners were at all times upon an area essentially public; at no time were they defiant or in breach of the peace; that they were peacefully exercising rights of assembly and speech to protest racial segregation; that the prosecution was procured for the purpose of preventing petitioners from speaking and otherwise peacefully protesting the refusal of the preponderant number of stores open to the public in the City of Durham to permit Negroes to enjoy certain facilities and that the arrests were in aid of this policy all contrary to the due process and equal protection clauses of the Fourteenth Amendment.

These motions were denied and exceptions were taken thereto (R. 34-35).

Following the close of petitioners' case they renewed their written motions to quash the indictments and for dismissal as of nonsuit. This motion was denied and exception was taken thereto (R. 51).

Assignments of Error were filed against the action of the Court in overruling the Motion to Quash (Assignments 1 and 2, R. 70), in overruling the motion for judgment as of nonsuit (Assignments 4, 5, 6 and 7, R. 71), and to the action of the Court in overruling defendants' motions to quash the indictments and for dismissal as of nonsuit made at the close of all the evidence (Assignment 10, R. 71).

The Supreme Court of North Carolina disposed adversely of these constitutional claims. It concluded its opinion by stating:

> "All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution." (App. p. 21a.)

In explication it held that:

> "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law." (App. p. 7a.)

Moreover, the opinion held that:

> "'The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included

the right to acquire, hold, enjoy, possess, use, manage, . . . property.' 11 Am. Jur., Constitutional Law, §335." (App. p. 11a.)

To the argument that the action taken below constitutes state action contrary to the due process and equal protection clauses of the Fourteenth Amendment, the Court held:

> "Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, *even though it enforces the clear legal right of racial discrimination of the owner.*" (Emphasis supplied.) (App. p. 12a.)

Moreover, no freedom of speech and assembly were denied, the Court held:

> "No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right." (App. p. 16a.)

## Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, resolved by the court below in conflict with principles expressed by this Court.

## I.

**The State of North Carolina has enforced racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.**

Petitioners seek certiorari to the Supreme Court of North Carolina, having unsuccessfully contended below that their conviction constitutes state enforcement of racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment. In rejecting petitioners' claim, the court below held that ". . . the purpose of the judicial process" was "'. . . to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner" (App. p. 12a). Answering the claim that this was state action prohibited by the Fourteenth Amendment, the court below replied that the right of property is "fundamental, natural, inherent and inalienable," being "not ex gratia from the legislature, but ex debito from the Constitution" (App. p. 11a); that the right could be characterized as "sacred"; and that the North Carolina trespass laws were "color blind," their sole purpose being to protect property from trespassers (*Id.*). The Court held that the police and judicial action in arresting and convicting petitioners "cannot fairly be said to be state action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution" (App. p. 13a).

But from the officer's orders to depart to the final judgment of the highest state court, this has been the state's cause. Judicial acts of state courts are "state action" un-

der the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1.[2] Equally clear, the Amendment reaches conduct of the police. Cf. *Monroe* v. *Pape*, —— U. S. ——, 5 L. ed. 2d 492 (1961); *Screws* v. *United States*, 325 U. S. 91. See also *Baldwin* v. *Morgan*, —— F. 2d —— (5th Cir. No. 18280, decided Feb. 17, 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960); *Valle* v. *Stengel*, 176 F. 2d 697 (3rd Cir. 1949), all of which condemn police enforcement of racial segregation in public places.

State action which enforces racial discrimination and segregation is condemned by the Fourteenth Amendment's equal protection clause. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Shelley* v. *Kraemer*, *supra*; *Gayle* v. *Browder*, 352 U. S. 903. Moreover, state inflicted racial discriminations, bearing no rational relation to a permissible governmental purpose, offend the concept of due process. *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1.

For the state to infect the administration of its criminal laws by using them to support lunch counter segregation,

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[2] The subject of judicial action as "state action" is treated exhaustively in Part II of Chief Justice Vinson's opinion which concludes:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." (*Id.* at 18.)

In addition to the many cases cited in *Shelley*, *supra*, at 14-18, see also: *Barrows* v. *Jackson*, 346 U. S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.

as an aspect of the "customs" of a segregated society, offends the salutary principle that criminal justice must be administered "without reference to consideration based upon race." *Gibson* v. *Mississippi*, 162 U. S. 565, 591.

Indeed, when the Supreme Court of North Carolina held that the state judicial process "enforces the clear, legal right of racial discrimination of the owner" (App. p. 12a), it "construed this legislative enactment as authorizing discriminatory classification based exclusively on color." Cf. Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Wk. 4317, 4320. And, as Mr. Justice Frankfurter wrote, dissenting in the *Burton* case, "for a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." (*Ibid.*)

The Fourteenth Amendment from the beginning has reached and prohibited all racial discrimination save that "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," and that which is "not sanctioned in some way by the State," *Civil Rights Cases*, 109 U. S. 3, 17. "State action of every kind . . . which denies . . . the equal protection of the laws" is prohibited by the Amendment. *Id.* at 11; cf. *Burton* v. *Wilmington Parking Authority*, *supra*. The Fourteenth Amendment was "primarily designed" to protect Negroes against racial discrimination. *Strauder* v. *West Virginia*, 100 U. S. 303, 307. "The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from . . . legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy. . . ." (*Ibid.*)

The fact that a property interest is involved does not imply a contrary result. It is the state's power to enforce such interests that is in issue. For, as the Court said in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> ". . . It would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501."

Indeed, as the Court said in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506:

> "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Here, certainly, is the case of "an owner, [who] for his advantage, opens up his property for use by the public in general."

Petitioners contend that the states may not, under the Fourteenth Amendment, use their police[3] and judiciary

[3] The arresting officer took full responsibility for the arrest:

> "After Mr. Boger asked these defendants to leave, in my presence, and they refused to leave, that constituted trespassing. He did not sign the warrants after the arrest. I did not have a warrant with me when we made the arrest. Mr. Boger did not sign the warrant before we arrested them" (R. 25).

to enforce racial discrimination for a business open to the general public. Analyzing the totality of circumstances, with regard for the nature of the property interests asserted, and the state's participation in their creation and enforcement no property interest of such an enterprise warrants departing from the Fourteenth Amendment's clear stricture against racial discrimination. As this Court said recently in *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Week 4317, 4318 (April 17, 1961):

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is 'an impossible task' which 'this Court has never attempted.' *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

What is the "property right" involved here? S. H. Kress and Company did business in a commercial building opened to the public as a whole for the business advantage of the owner. There was no practice of selecting customers or limiting the classes of persons who may enter. The store was not, as some may be, limited to men, women, adults, white persons or Negroes. Negroes were accommodated throughout the building except the basement lunch counter (R. 22). No claim or interest in privacy was exercised by the owner in the customary use of this building.

The specific area in dispute, the lunch counter, was an integral part of this single commercial establishment, and like the entire premises was open to the public to do business for profit. It was not severed for the owner's private use; nor was it like a stockroom, employees' working area, or a living space connected to a store.

There is no issue concerning protection of property from use alien to its normal intended function. Petitioners sought only to purchase food. Whatever their motives (a frankly acknowledged desire to seek an end to racial discrimination), their actions conformed to those of ordinary purchasers of food. Petitioners were not disorderly or offensive. The manager's sole objection was that some of them were Negroes and the others accompanied Negroes. The sole basis of exclusion, ejection, arrest and conviction was race. The "crime" was being Negroes, or being with Negroes, at a "white only" lunch counter.

Moreover, the manager testified that the lunch counter was segregated "in the interest of public safety" (R. 22), and that company policy throughout the country was "dependent upon the customs of the community" (R. 22). Obviously then, the asserted right here is related to participation in, or conformity with, a community custom of segregation, the maintenance of a segregated society.

Therefore, the asserted "property" right was simply the right to discriminate solely on the basis of race, and according to the customs of the community, in one integral part of a single commercial building open to the general public against persons otherwise welcome in all other parts of the premises. This, indeed, may be called a "property right" but as thus revealed, it is far from the "sacred, natural, inherent and inalienable" property right (App. p. 11a) which the generalized language of the court below

held to be at stake. For as Mr. Justice Holmes wrote, dissenting in *Lochner* v. *New York*, 198 U. S. 45, 76, "[g]eneral propositions do not decide concrete cases."

The arbitrary quality of the "property right" supported by the state's trespass law here is emphasized by the fact that the Kress Company required segregation only for customers who sit to eat; those standing to eat in the same store were served without any racial discrimination (R. 22). Cf. *Burton* v. *Wilmington Parking Authority, supra*, terming exclusion of a Negro as offensive in a restaurant and his acceptance in other parts of the same building "irony amounting to grave injustice." 29 U. S. L. Week 4317.

This "property interest" hardly need be protected in order for our form of constitutional government to survive (see App. pp. 13a, 15a). Obviously, for example, this type of "property interest" may be taken away by the states without denying due process of law.[4] Indeed, mere reference to the common law duty of common carriers and innkeepers demonstrates that an owner's use of his property affects the nature of his dominion over it. Cf. *Civil Rights Cases*, 109 U. S. 3, 25. This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510; *Marsh* v. *Alabama*, 326 U. S. 501, 506; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 417 (Justice Brandeis's dissenting opinion). See *Munn* v. *Illinois*, 94 U. S. 113; 5 Powell on Real Property 493 *et seq.* (1956).

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[4] See for example, *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359; cf. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

This case does not involve a claim that the state must affirmatively provide a legal remedy against "private" racial discrimination. (Cf. *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Week 4317, April 17, 1961). Rather, petitioners assert only their immunity from criminal prosecution. Nor is there involved judicial enforcement of racial discrimination by trespass laws to protect an owner's interest in maintaining privacy in the use of his property, such as a home or private club. Countervailing considerations that may be involved when a state acts to protect its citizens' interest in their privacy, are not present. There is no issue as to whether state trespass laws may be used to enforce an exclusion for no reason. Finally, there is no claim that the Fourteenth Amendment bars enforcement of trespass laws generally.

Consequently, the case involves only this highly important issue: Whether the state may use its executive and judicial machinery (particularly its criminal laws) to enforce racial discrimination for a business company that by its own choice and for its own advantage has opened its commercial property to the public. Petitioners submit that prior decisions of this Court demonstrate this question should be answered No.

This case merits plenary review in this Court because of the substantial public importance of the questions relating to the extent to which a state may use its criminal laws to enforce racial segregation. As indicated to the Court in petitions for certiorari filed and granted in *Garner, Briscoe*, and *Hoston* v. *State of Louisiana*, Nos. 617, 618 and 619, October Term 1960, this problem is one which has arisen in many different communities and many state courts since the spring of 1960. See, Pollitt, "Dime Store Demon-

strations: Events and Legal Problems of the First Sixty Days," 1960 Duke Law Journal 315. Review of this case will facilitate the proper disposition of many similar criminal prosecutions.

## II.

**The criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited; petitioners' conduct violated no standard required by the plain language of the law; thereby their conviction offends the due process clause of the Fourteenth Amendment and conflicts with principles announced by this Court.**

Petitioners were convicted under North Carolina General Statute, §14-134, which provides:

> If any person after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days.

Although the statute in terms prohibits only going on the land of another *after* being forbidden to do so, the Supreme Court of North Carolina has now construed the statute to prohibit also remaining on property when directed to leave following lawful entry. (See Opinion below, App. p. 12a). Stated another way, the statute now is applied as if "remain" were substituted for "enter." Expansive judicial interpretation of the statute began by a statement in *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958) (a case in which defendants deliberately ig-

nored racial signs posted outside an ice cream parlor and also refused to leave upon demand),[5] 92 years after enactment of the law.[6]

The instant case is the first unambiguous holding under §14-134 which convicts defendants who went upon property with permission and merely refused to leave when directed.

Without a doubt petitioners and all Negroes were welcome within the store—apart from the basement lunch counter. The arresting officer stated that "The only crime committed in my presence, as I saw, it was their failure and refusal to leave when they were ordered to do so by the Manager" (R. 26). There were no discriminatory signs outside the store (R. 23). No sign forbade Negroes and white persons who accompany Negroes to sit at the lunch counter; the sign said merely "Employees and Invited Guests Only" (R. 21). Whatever petitioners' knowledge of the store's racial policy as it had been practiced, there was no suggestion that they had ever been forbidden to go to the lunch counter and request service. The Court's conclusory statement that defendants "entered" (trespassed) "after having been forbidden to do so" (App. 19a), was simply a holding that defendants' acts in failing to leave when directed violated the statute.

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[5] In the *Clyburn* opinion, and here, the State court explained construction of §14-134 by reference to analogous construction of a statute prohibiting forcible entry and detainer (N. C. Gen. Stat. §14-126), which had been construed to apply to peaceful entry followed by forcible opposition to a later demand to leave. The Court held that "entry" was synonymous with "trespass" in both statutes (14-126 and 14-234). (14-134 does not use the word "entry"; it states "go or enter upon".)

The facts of the *Clyburn* case are summarized in the opinion below in this case (App. pp. 8a-9a).

[6] The Statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, C. 60.

Absent the special expansive interpretation given §14-134 by the North Carolina Supreme Court the case would plainly fall within the principle of *Thompson* v. *City of Louisville*, 362 U. S. 199, and would be a denial of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after having been forbidden to do so," and the conclusion that they did rests solely upon the special construction of the law.

Under familiar principles the construction given a state's statute by its highest court determines its meaning. However, petitioners submit that this statute has been so judicially expanded that it does not give a fair and effective warning of the acts it now prohibits. Rather, by expansive interpretation the statute now reaches more than its words fairly and effectively define, and as applied it therefore offends the principle that criminal laws must give fair and effective notice of the acts they prohibit.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids", *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, and cases cited therein in note 2.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 306, 311:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. Lanzetta v. New Jersey, 306 U. S. 451, and cases cited.

In *Pierce, supra,* the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the T. V. A. Similarly in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry or inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177:

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. United States v. L. Cohen Grocery Co., 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. Herndon v. Lowry, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases runs a uniform application of the rule expressed by Chief Justice Marshall:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, be-

cause it is of equal atrocity, or of kindred character, with those which are enumerated (Id. 18 U. S. (5 Wheat.) at 96.)

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction closely akin to the constitutionally required rule of fair and effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey, supra,* and "cases cited therein," while *Cardiff* mentions *United States* v. *L. Cohen Grocery Co., supra,* and *Herndon* v. *Lowry, supra.*

On its face the North Carolina trespass statute warns against a single act, i.e., going or entering upon the land of another "after" being forbidden to do so. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

But by judicial interpretation "enter" was held synonymous with "trespass," and, in effect, also with "remain." Here a legislative *casus omissus* was corrected by the court. But as Mr. Justice Brandeis observed in *United States* v. *Weitzel, supra* at 543, a *casus omissus* while not unusual, and often undiscovered until much time has elapsed, does not justify extension of criminal laws by reference to legislative intent.

Moreover, that the indictments specified both that petitioners had entered after having been forbidden and also that they refused to leave after being ordered to do so, does not correct the unfairness inherent in the statute's

failure specifically to define a refusal to leave as an offense. As this Court said in *Lanzetta* v. *New Jersey*, *supra*:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have specifically recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[7]

Converting by judicial construction the common English word "enter" into a word of art meaning "trespass" or "remain," has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common word will understand, of what the law intends to do if a certain line is passed". (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common law usage of the word "enter"

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[7] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wordings of the statutes vary but all of them effectively distinguish the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71-1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code, §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code §2411; Nevada Code, §207.200; Ohio Code, §2909.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

support the proposition that it is synonymous with "trespass" or "remaining." While "enter" in the sense of going on and taking possession of land is familiar (Ballantine, "Law Dictionary", (2d Ed. 1948), 436; "Black's Law Dictionary" (4th Ed. 1951), 625), its use to mean "remaining on land and refusing to leave it when ordered off" is novel.

Judicial construction often has cured criminal statutes of the vice of vagueness, but this has been construction which confines, not expands, statutory language. Compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, with *Herndon* v. *Lowry*, 301 U. S. 242.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws and embodied in the due process clause of the Fourteenth Amendment.

## III.

**The decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to freedom of expression.**

Petitioners were engaged in the exercise of free expression by means of verbal requests to the management and the requests implicit in seating themselves at the counter for nonsegregated lunch counter service. Their expression (asking for service) was entirely appropriate to the time and place in which it occurred. Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as no disorder or obstruction of business occurs.

Petitioners did not shout, obstruct business, carry picketing signs, give out handbills, or engage in any conduct inappropriate to the time, place and circumstances. And, as is fully elaborated above in Part I of this petition, there was no invasion of privacy involved in this case, since the lunch counter was an integral part of commercial property open up to the public.

This Court and other courts on numerous occasions have held that the right of free speech is not circumscribed by the mere fact that it occurs on private property. The existence of a property interest is but one circumstance to be considered among many. In *Marsh* v. *Alabama, supra,* for example, this Court overturned the trespass conviction of Jehovah's Witnesses who went upon the premises of a company town to proselytize holding that such arrest and conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, the Court upheld the validity of the National Labor Relations Board's ruling that lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices.[8]

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[8] See also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir., 1945); *United Steelworkers* v. *N. L. R. B.*, 243 F. 2d 593, 598 (D. C. Cir., 1956) (reversed on other grounds) 357 U. S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252 (employees seized plant; discharge held valid: "high-handed proceeding without shadow of legal right").

In *Martin* v. *Struthers*, 319 U. S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residence for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", *Breard* v. *Alexandria*, 341 U. S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation of magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U. S. 644, might convict for crime in the nature of trespass after balancing the "conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U. S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

Similarly, following an appraisal of the speech and property considerations involved, a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center. See also *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948), which held that picketing within Pennsylvania Station was not trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it";

*Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959), which denied relief to a shopping center owner against picketers on his property, relying on the Fourteenth Amendment.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is not limited to verbal utterances, though petitioners here expressed themselves by speech. The right comprehends picketing, *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, 319 U. S. 141; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

In the circumstances of this case, the only apparent state interest being preserved was that of maintaining the management's rights to exclude Negroes from the lunch counter. The management itself sought nothing more. But as Justice Holmes held in *Schenck* v. *United States*, 249 U. S. 47, 52, the question is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil" that the state has a right to prevent.

The state has no interest in preserving such discrimination and certainly has no valid interest in suppressing speech which is entirely appropriate to the time and place and does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community.

## CONCLUSION

**Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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**Opinion by Mr. Justice Mallard**

SUPREME COURT OF NORTH CAROLINA

Fall Term 1960

No. 654—Durham

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STATE

—v.—

JOHN THOMAS AVENT

STATE

—v.—

LACY CARROLE STREETER

STATE

—v.—

FRANK MCGILL COLEMAN

STATE

—v.—

SHIRLEY MAE BROWN

STATE

—v.—

DONOVAN PHILLIPS

STATE

—v.—

CALLIS NAPOLIS BROWN

STATE

—v.—

JOAN HARRIS NELSON

---

Appeal by defendants from Mallard, *J.*, 30 June 1960 Criminal Term of Durham.

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors

and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the

reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department testified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H. Kress and Company in its luncheonette department. All are members of a student organization, which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service.

The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friend, Bob Markham, a Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

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William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., *for Defendants-Appellants.*

*Parker, J.* Each defendant—five of whom are Negroes and two members of the White race—before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. *S.* v. *Perry,* 248 N. C. 334, 103 S. E. 2d 404; *Carter* v *Texas,* 177 U. S. 442, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, §141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corporation, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cook-shop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person

resorts for the temporary purpose of obtaining a meal or something to eat." *S.* v. *Shoaf*, 179 N. C. 744, 102 S. E. 705. To the same effect see, 29 Am. Jur., (1960), Innkeepers, §9, p. 12. In *Richards* v. *Washington F. & M. Ins. Co.*, 60 Mich. 420, 27 N. W. 586, the Court said: "A 'restaurant' has no more defined meaning, (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cookshop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate." Quoted with approval in *Michigan Packing Co.* v. *Messaris*, 257 Mich. 422, 241 N. W. 236, and restated in substance in 43 C. J. S., Innkeepers, §1, subsection b, p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. *S.* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4th Circuit 27 December 1960, —— F. 2d ——; *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906; *Wilmington Parking Authority* v. *Burton* (Del.), 157 A. 2d 894; *Nance* v. *Mayflower*

*Restaurant*, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, §21; *Powell* v. *Utz*, 87 F. Supp. 811; and Annotation 9 Am. & Eng. Ann. Cas. 69—statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In *Alpaugh* v. *Wolverton, supra*, the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve every one who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In *Boynton* v. *Virginia*, 5 December 1960, —— U. S. ——, —— L. Ed. ——, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In *S.* v. *Clyburn, supra*, the defendants were tried on similar warrants charging that each defendant unlawfully entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream

Company retailing ice cream and sandwiches. The building in which they did business is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and they were arrested by a police officer of the city of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts in this nation. Madden v. Queens County Jockey Club, 72 N. E. 2d 697 (N. Y.); Terrell Wells Swimming Pool v. Rodriguez, 182 S. W. 2d 824 (Tex.); Booker v. Grand Rapids Medical College, 120 N. W. 589 (Mich.); Younger v. Judah, 19 S. W. 1109 (Mo.); Goff v. Savage, 210 P. 374 (Wash.); De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818 (Utah); Brown v. Meyer Sanitary Milk Co., 96 P. 2d 651 (Kan.); Horn v. Illinois Cent. R. Co., 64 N. E. 2d 574 (Ill.); Coleman v. Middlestaff, 305 P. 2d 1020 (Cal.); Fletcher v. Coney Island, 136 N. E. 2d 344 (Ohio); Alpaugh v. Wolverton, 36 S. E. 2d 906 (Va.). The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

In an Annotation in 9 A. L. R., p. 379, it is said: "It seems to be well settled that, although the general public

have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, *Brookside-Pratt Min. Co.* v. *Booth*, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417, and Annotation in 33 A. L. R. 421.

This is said by Holmes, J., for the Court in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 256, 60 L. Ed. 984, 987, a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company: "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes . . . "

None of the cases cited in defendants' brief are applicable to the situation which obtains in the instant cases. For instance, *Cooper* v. *Aaron*, 358 U. S. 1, 3 L. Ed. 2d 5—public education; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531—public transportation; *Valle* v. *Stengel*, 176 F. 2d 697—a case in respect to an amusement park in the State of New Jersey, which State has a statute, R. S. 10: 1-3, N. J. S. A., providing that no proprietor of a place of public resort or amusement. ". . . shall directly or indirectly refuse, withhold from, or deny to, any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed or color," R. S. 10: 1-6, N. J. S. A.

"The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." 11 Am. Jur., Constitutional Law, §335.

G. S. 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? *S. v. Baker*, 231 N. C. 136, 56 S. E. 2d 424.

G. S. 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute

is also color blind. "Its purpose is to protect possession only." *S. v. Baker, supra.* We have repeatedly held in applying G. S. 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonymous with the word "trespass." *S. v. Clyburn, supra.*

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G. S. 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, §17, of the State Constitution. *S. v. Clyburn, supra.*

Defendants in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, §17, of the State Constitution, and further that G. S. 14-134 and G. S. 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 109 US 3, 27 L ed

835, 3 S Ct 18 (1833), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: *Collins* v. *Hardyman*, 341 U. S. 651, 95 L. Ed. 1253; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—, and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. 14-134 and G. S. 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the cleared legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. 14-134 and G. S. 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such

judicial process violates no rights of the defendants guaranteed to them by Article I, §17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, §76, p. 167; 6 C. J. S., Assault and Battery, §20, (2). This is said in 4 Am. Jur., Assault and Battery, §76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, §78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C. J. S., Assault and Battery, p. 821. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional

form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (*Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In *Slack* v. *Atlantic White Tower System, Inc.*, *supra*, the Court said; "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In *S.* v. *Cooke*, 248 N. C. 485, 103 S. E. 2d 846, the defendants were convicted and sentenced on a charge that they did "unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. *Wolfe* v. *North Carolina*, 364 U. S. 177, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question

of State action referred to. It seems that if the United States Supreme Court had thought that th arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a State has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be nonsuited, because the demands that they leave Kress' store, their arrest by an officer of the city of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of free speech and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. Ed. 513, 10 A. L. R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. Th *Saia* Case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, *Schenck* v. *United States*, 249 US 47, 52, 63 L ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in

a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G. S. 14-134 and G. S. 14-126 in Kress' store.

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Company contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in *S. v. Clyburn, supra,* in *Slack v. Atlantic White Tower System, Inc., supra,* and in *Williams v. Howard Johnson's Restaurant, supra,* and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G. S. 14-134 is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, §17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in that W. K. Boger did not identify himself when he asked them not to enter the luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G. S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *S.* v. *Corl*, 250 N. C. 252, 108 S. E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made at the close of all the evidence. G. S. 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence (*S.* v. *Nall*, 239 N. C. 60, 79 S. E. 2d 354), as we are required to do in passing upon defendants' motion made at the close of all the

evidence, it tends to show that all the defendants without legal or constitutional right or *bona fide* claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact, that the violations by all defendants of G. S. 14-126 and G. S. 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all, of the Negro defendants in urging people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all, of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. *S.* v. *Dillard,* 223 N. C. 446, 27 S. E. 2d 85, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed

to explain adequately the law in the case. Citing authority. The assignment must particularize and point out specifically wherein the court failed to change the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. *Barnette* v. *Woody*, 242 N. C. 424, 88 S. E. 2d 223; *Watters* v. *Parrish*, 252 N. C. 787, 115 S. E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N. C. 544; *S.* v. *Atkins*, 242 N. C. 294, 87 S. E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G. S. 1-180, and in particular instructed the jury to the effect that if the defendants entered the luncheonette department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. *S.* v. *Clyburn, supra; S.* v. *Fisher*, 109 N. C. 847, 13 S. E. 878. This Court said in *S.* v. *Crawley*, 103 N. C. 353, 9 S. E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient—he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. *S.* v. *Bryson*, 81 N. C. 595." This Court said in *S.* v. *Wells*; 142 N. C.

590, 55 S. E. 210: "True we have held in several well-considered decisions that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. *S.* v. *Glenn*, 118 N. C., 1194; *S.* v. *Durham*, 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution.

*No Error.*

A TRUE COPY:

/s/ ADRIAN J. NEWTON.
*Clerk of Supreme Court of North Carolina.*

[SEAL]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE

—v.—

JOHN THOMAS AVENT, LACY CARROLE STREETER, FRANK MCGILL COLEMAN, SHIRLEY MAE BROWN, DONOVAN PHILLIPS, CALLIS NAPOLIS BROWN and JOAN HARRIS NELSON

| | |
|---|---|
| Appeal docketed | 8 November 1960 |
| Case argued | 29 November 1960 |
| Opinion filed | 20 January 1961 |
| Final judgment entered | 20 January 1961 |

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 6th day of March, 1961.

ADRIAN J. NEWTON
*Clerk of the Supreme Court of the State of North Carolina*

Office-Supreme Court, U.S.
FILED
MAY
JAMES R. BROWNING, Clerk

# Supreme Court of the United States

October Term, 1962

No. 943 11

JOHN THOMAS AVENT, CALLIS NAPOLIS BROWN, SHIRLEY MAE BROWN, FRANK McGILL COLEMAN, JOAN HARRIS NELSON, DONOVAN PHILLIPS, and LACY CARROLE STREETER,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

## BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# Supreme Court of the United States

October Term, 1960

No. 943

JOHN THOMAS AVENT, CALLIS NAPOLIS BROWN, SHIRLEY MAE BROWN, FRANK McGILL COLEMAN, JOAN HARRIS NELSON, DONOVAN PHILLIPS, and LACY CARROLE STREETER,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

## BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### OPINION BELOW

The opinion of the Supreme Court of North Carolina, in this case, is reported as STATE v. AVENT, et als, 253 N.C. 580 (No. 6 Advance Sheets of North Carolina, issued February 15, 1961); 118 S.E. 2d 47. The opinion of the Supreme Court of North Carolina in this case also appears in the Petitioners' Appendix attached to their Petition and Brief at p. 1a. The Petitioners erroneously attribute the opinion of the Supreme Court of North Carolina to "Mr. Justice Mallard," when the truth of the matter is that Judge Mallard is Judge of the Superior Court, which is a court of general jurisdiction, and he tried the case in the Court below, at the trial stage. The opinion of the Supreme Court of North Caro-

lina was written by Mr. Justice Parker, as will appear on p. 6a of the Petitioners' Appendix. The Judgment of the Superior Court of Durham County, North Carolina, is not officially reported but appears in the State Record certified to this Court on p. 15.

## JURISDICTION

The Petitioners invoke the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. 1257 (3). The Respondent, North Carolina, denies that this Court has been presented a sufficient basis in this case for the exercise of its jurisdiction.

## QUESTIONS PRESENTED

The Respondent, North Carolina, will oppose the granting of the Writ herein sought by the Petitioners and for purposes of argument the Respondent will assume that the questions presented by the Petitioners on p. 2 of their brief are the questions to be considered.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Petitioners invoke Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Petitioners also attack Section 14-134 of the General Statutes of North Carolina, the pertinent part of which is as follows:

"G.S. 14-134. Trespass on land after being forbidden. If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

## RESPONDENT'S STATEMENT OF THE CASE

The Record of this case before the Supreme Court of North Carolina (No. 654—14th District—Fall Term, 1960)

has been certified to this Court by the Clerk of the Supreme Court of North Carolina, and we will refer to this Record (State Record) by the designation SR.

The Petitioners were each indicted by the Grand Jury of Durham County for a violation of G.S. 14-134 in that they committed a criminal trespass on the land and property of S. H. Kress & Company, Owner, they having entered unlawfully upon said premises and having willfully and unlawfully refused to leave the premises after being ordered to do so by the agent and manager of S. H. Kress & Company. The indictments (SR-2) were all consolidated for the purpose of trial (SR-15); the cases were tried and presented to the jury, and a verdict of guilty as to each Petitioner was returned. (SR-15) The Court pronounced judgment in the various cases which are shown on SR-15, and from these judgments the Petitioners each appealed to the Supreme Court of North Carolina.

This case is another facet of the demonstrations which have occurred in various states and which have been sponsored by the National Student Association, the Congress of Racial Equality (CORE), and the National Association for the Advancement of Colored People. The movement was dominated and led primarily by students of the colored race and some students of the white race and the objective was to move into various privately-owned stores and take charge of the lunch counters which the owners maintained and operated for customers of the white race and prevent the white customers from being served at these lunch counters.

According to the evidence of W. K. Boger, Manager of the Durham Store of S. H. Kress & Company, (SR-20) on May 6, 1960, all of the Petitioners came into the store located on West Main Street in Durham. The luncheonette was open for the purpose of serving invited guests and employees and signs were posted over and about the luncheonette department stating that the department was operated for employees and guests only; there were iron railings which separated this department from the other departments in the

store, and the luncheonette department had chained entrances. (SR-21) The manager had a conversation with every one of the Petitioners, (SR-21) and he explained to them the status of the lunch counter and asked the Petitioners to leave. Before the Petitioners were seated at the lunch counter the manager asked them not to take these seats, and when, in spite of his directions and wishes, the Petitioners seated themselves at the lunch counter, the manager asked them to leave. (SR-21) The manager called an officer of the City Police Department and the officer asked the Petitioners to leave, and, upon their refusing to do so, each of the Petitioners was arrested for trespassing upon the property.

The Petitioner Frank McGill Coleman is a member of the white race, a student at Duke University, and was engaged in concerted action with the colored Petitioners. The Petitioner Joan Harris Nelson is a freshman at Duke University and is apparently a white person. All of the actions of the Petitioners show that they had previously discussed what they would do and how they would operate in making this demonstration and in creating a situation which would afford a test case for the colored Petitioners.

The evidence of the State, as well as the evidence of the Petitioners, establishes certain facts, as follows:

(1) That prior to the sit-in demonstrations which resulted in the present arrests and indictments of the Petitioners, the Petitioners had counsel and had consulted counsel while the demonstration was in its organizational process. (SR-38)

(2) The Petitioners had previously been engaged in picketing this store and in urging a boycott unless their demands for luncheon service were met. (SR-37, 41, 42, 44, 48, 49, 50.)

(3) It is clear from the evidence of Callis Napolis Brown (SR-46) that there was an organization for this purpose, that the organization had leaders, and that a meeting was

held on the night before May 6, 1960, and it was decided and planned to make a purchase in some other part of the store before going down and attempting to secure lunch counter service. (SR-46)

(4) Purchases were made by these defendants according to this previously agreed upon design or plan. (SR-36, 40, 43, 45, 48, 49)

(5) It is plain that the Petitioners expected and anticipated that they would not be served at the lunch counter and that they intended to remain until they were arrested. It is also clear that they solicited the aid of the two white students for the purpose of having an entering wedge into the seats of the lunch counter and for the purpose of confusing the situation by having the white students purchase the food and give it to the colored students.

(6) It is further clear that counsel had been consulted and cooperated in all these movements even to the point of providing bonds for the Petitioners after they were arrested. (See SR. 39, where Lacy Carrole Streeter testified: "I left the matter of a bond to my attorneys. I employed my attorneys in February. I started consulting with my attorneys in February. I kept them retained until May 6, 1960.")

## ARGUMENT

### I

### THE STATE PROSECUTION DID NOT DEPRIVE PETITIONERS OF ANY RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT.

Petitioners in their Brief assert several propositions relating to race discriminations prohibited by the Fourteenth Amendment about which there is no contest and which do not come within the ambit of the issues to be resolved in this case. Some of these propositions, about which there is no controversy, are as follows:

(1) The Respondent admits that action by the judicial branch of a state government can be such a type of state action that offends against the prohibitory provisions of the Fourteenth Amendment (SHELLEY v. KRAEMER, 334 U. S. 1; BARROWS v. JACKSON, 346 U. S. 249; Race Relations Law Reporter, Vol. 1, No. 3, pp. 613, 622). We still think there is such a thing as valid state action by the judicial branch of a state government.

(2) The Respondent admits that the provisions of the Fourteenth Amendment extend to and reach the conduct of state police officers (MONROE v. PAPE, No. 39, Oct. Term, 1960, Feb. 20, 1961; SCREWS v. UNITED STATES, 325 U. S. 91). We deny that it extends to and reaches valid conduct of state police officers exercised under valid state authority.

(3) We admit that there can be unlawful state action by a police officer acting under "color of law" where a state has enacted a Civil Rights statute which prohibits the denial of accommodations or privileges to a person because of color in places of amusement or in restaurants. (VALLE v. STENGEL, CCA-3, 176 F. 2d 697, 701). We think the rule can be different where a state has no such statute.

(4) We admit that where a state grants a franchise to a public utility there cannot be discrimination in the use of facilities or services furnished the patrons because of color nor can the state enforce such discriminations by delegating the power to make rules or by criminal sanctions (BOMAN v. BIRMINGHAM TRANSIT CO., CCA-5, 280 F. 2d 531; BOWDER v. GAYLE, 142 F. Supp. 707, aff'd 352 U. S. 903; FLEMING v. SOUTH CAROLINA ELEC. & GAS CO., CCA-4, 224 F. 2d 752). We deny that this rule applies to business under private ownership.

(5) We admit that all citizens, white and colored, have the right to contract, acquire and own property, are entitled to security of person and property, and to inherit, purchase, lease, hold and convey real and personal property as set forth in R.S. 1977, 42 USC 1981, and R.S. 1978, 42 USC

1982. We do not admit that any person, white or colored, can be constitutionally forced to sell any private property or product to another person, or that one person is forced to negotiate with another person in or about any property or business transaction.

(6) We admit that there is an abundance of legal authority to the effect that a state or a subdivision of a state which operates restaurants or other facilities, or operates playgrounds or parks, or facilities of this nature, cannot by the device of a lease to private persons or firms discriminate against colored persons who desire to use such facilities, and that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." (BURTON v. WILMINGTON PARKING AUTHORITY, 29 U. S. Law Week 4317, No. 164, Oct. Term 1960, April 17, 1961; DERRINGTON v. PLUMMER, CCA-5, 240 F. 2d 922; CITY OF GREENSBORO v. SIMKINS, CCA-4, 246 F. 2d 425; DAWSON v. BALTIMORE, CCA-4, 220 F. 2d 386, aff'd 350 U. S. 877).

(7) We don't think the cases on discrimination in public schools have anything to do with this case, but we admit there can be no state action which supports racial discrimination in this field and as set forth in the cases of BROWN v. BOARD OF EDUCATION, 347 U. S. 483, BOLLING v. SHARPE, 347 U. S. 497, and COOPER v. AARON, 358 U. S. 1.

Our contentions and the concepts that we believe to be sound have been fully stated by Mr. Justice Parker in STATE v. AVENT et als., 253 N. C. 580 (N. C. Advance Sheets No. 6, issued Feb. 15, 1961), 118 S. E. 2d 47, Petitioners' Appendix p. 2a. The matter has been considered by the law review writers (47 Virginia Law Review—No. 1, Jan. 1961, p. 1; 46 Virginia Law Review - 1960 - p. 123; 15 U. of Miami Law Review - No. 2 - 123; Race Relations Law Reporter, Vol. 5, No. 3 - Fall 1960 - p. 935; 1960 Duke Law Journal 315).

We assert that private citizens or persons have the right to practice private discrimination for or against each other. This runs all through the fabric of society and life. Clubs, lodges and secret societies will accept some as members and reject others. The country club people do not associate with the people that live in slum areas and across the railroad track. The people of some races will have no dealings with people of other races. Discriminations are practiced inside the race group. The colored insurance men, doctors and bankers do not have social affairs that are open to the cotton and cornfield Negroes. We further assert that any colored citizen can refuse to transact business with a white person or to have him on his business premises and the rule applies in reverse. Up to the present time, in private business, no man has been compelled to sell his product, goods or services to another unless he desired to so do. The reasons or motives that prompt his choice of action are irrelevant. The same private rights in the use and enjoyment of property are available to all. The protection of these private rights is not an "indiscriminate imposition of inequalities". As said by Mr. Justice Holmes (TERMINAL TAXICAB CO. v. KUTZ, 241 U. S. 252, 256):

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing on the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *."

This court carefully stated (SHELLEY v. KRAEMER, 334 U. S. 1):

> "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (citing in the note: UNITED STATES v. HARRIS, 106 U. S. 629; UNITED STATES v. CRUIKSHANK, 92 U. S. 542.)

In BOYNTON v. VIRGINIA, 5 L. ed. 2d 206, _____ U. S. _____, this Court said:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

But if there existed another vital, and primary constitutional principle that required that restaurant service be supplied by the roadside restaurant to a colored man, then there would seem to be no reason why this Court should pass it by and not settle the question.

The State Statute here under consideration is an old statute and has been passed upon by the Supreme Court of North Carolina many times. It appears in the State code as G. S. 14 - 134 and we refer the Court to certain cases, as follows: STATE v. CLYBURN, 247 N. C. 155, 101 S. E. 2d 295; STATE v. COOKE et als., 246 N. C. 518, 98 S. E. 2d 885; STATE v. GOODSON, 235 N. C. 177, 69 S. E. 2d 242; ARMSTRONG v. ARMSTRONG, 230 N. C. 201, 52 S. E. 2d 362; LEE v. STEWART, 218 N. C. 287, 10 S. E. 2d 804; STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424. See also cases cited in annotation to Sec. 14 - 134 in General Statutes of North Carolina, and the 1959 Supplement thereto. A related statute is G. S. 14 - 126 which is as follows:

> "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

This statute was borrowed from English law and in substance is 5 Richard II, c. 8, and in fact it would appear that this statute and the one under consideration are formulations of the common law.

The statute now attacked by Petitioners is a neutral statute and has no connection with the color of persons. We challenge the Petitioners to trace the reported decisions and show that in its judicial administration it has been applied to colored persons and not to white persons. It is available to the colored man if a white man will not leave his premises when requested to do so.

The implied invitation to the general public to come into a shop or store can lawfully be revoked. On this aspect of the case the Supreme Court of North Carolina (253 N. C. 580, 588) said:

> "In an Annotation in 9 A.L.R., p. 379, it is said: 'It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so.' The Annotation cites cases from eight states supporting the statement. See to the same effect, BROOKSIDE-PRATT MIN. CO. v. BOOTH, 211 Ala. 268, 100 So. 240, 33 A.L.R. 417, and Annotations in 33 A.L.R. 421".

Leaving aside the question of void-for-vagueness, the interpretation of the highest appellate Court of a state should be accepted by the Federal Courts (AMERICAN FEDERATION OF LABOR v. WATSON, 327 U. S. 582; PHILLIPS v. UNITED STATES, 312 U. S. 246; HIGHLAND FARMS DAIRY v. AGNEW, 300 U. S. 608).

The Petitioners have not cited any case dealing with private discrimination which supports their position, and indeed they cannot do so. Up to the present time the Courts that have considered the matter support our position (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295; WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, 268 F. 2d 845; SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., 181 F. Supp. 124, aff'd 284 F. 2d 746; see also cases cited in opinion of Supreme Court of North Carolina in this case, and in law review articles cited supra).

As we see the matter, up to the present time, wherever the prohibitions of the Fourteenth Amendment have been invoked there has been a clear, established right to be protected from state action or from any discrimination aided or assisted by state action. Up to the present time in this case the Petitioners are starting from a position where they have no clear, established right to be protected by constitutional guarantees. They are asking the Court to invent, create or conjure up the claimed right and then say it is entitled to the protection of the Fourteenth Amendment. If it shall be said that the State court cannot exert its power to protect the property rights of either race but will leave the parties to their own devices, or to the exercise of personal force, then the result will be something that neither the white or colored race really desires.

## II

## THE STATE STATUTE IS NOT UNCONSTITUTIONAL FOR UNCERTAINTY AND VAGUENESS.

The Petitioners' next attack on the statute comes under the so-called void-for-vagueness doctrine. Here we enter into a field of constitutional law which it seems to us is measured entirely by subjective tests.

There is one thing sure however,—the Petitioners were engaged in a previously organized campaign and there is strong reason to believe from the evidence that they had the advice of counsel. The Supreme Court of North Carolina has construed G. S. 14 - 134 many times to include the situation where a person enters upon lands or premises without protest and is later told by the owner or proprietor to leave the premises. The case of STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295, was decided on January 10, 1958, and Petitioners and their counsel had ample warning of this construction of the statute. We have heretofore cited above many cases in which the Supreme Court of North Carolina has construed the statute. This Court has said in substance that impossible standards of definition are not required and

that it is sufficient if the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." On this point, see ROTH v. UNITED STATES, 354 U. S. 476, and see annotation in 1 L. ed 2nd, p. 1511.

This State statute is certainly no more vague or uncertain than 18 USCA 242, which reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000.00, or imprisoned not more than one year, or both."

This Court reviewed the statute and its history and upheld the statute against an attack based on unconstitutional vagueness in SCREWS v. UNITED STATES, 325 U. S. 91.

For other causes in which statutes have been upheld against such an attack see: BEAUHARNAIS v. ILLINOIS, 343 U. S. 250, COLE v. ARKANSAS, 338 U. S. 345, WILLIAMS v. UNITED STATES, 341 U. S. 97, UNITED STATES v. WURZBACH, 280 U. S. 396.

As a practical matter, an ordinary layman has trouble with any statute no matter how precise its standards of conduct and no matter how clear it may be in the informational process. Statutes really are written for lawyers to read and to form opinions and advise clients thereon, and the statute now under attack when considered with the constructions of the highest appellate Court of the State clearly informs Counsel for Petitioners what the consequences could be.

There must be some latitude in statutory language be-

cause statutes are drafted for the most part in an attempt to take care of unanticipaed situations as well as those that may be in contemplation when the drafting process is first initiated. In NASH v. UNITED STATES, 229 U. S. 373, Mr. Justice Holmes summed up the situation as follows:

> "But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

This question has also been written about extensively by the law review writers and in closing this portion of the argument we cite a few of these articles but this is not to be construed by the Court as meaning that we approve all the criticisms and conclusions of the authors (109 University of Pennsylvania Law Review - No. 1, November 1960 - p. 67, 62 Harvard Law Review 77, 40 Cornell Law Quarterly 195).

## III

## THE STATUTE AS ADMINISTERED DOES NOT VIOLATE THE CONSTITUTIONAL PROTECTION OF FREEDOM OF SPEECH.

We assume here that the Petitioners are dealing with the principles of the First Amendment insofar as they may be incorporated in the Fourteenth Amendment. The evidence shows that Petitioners exercised their right of free speech to the fullest extent. Petitioners and their adherents had for days been exercising their right to protest and the right of freedom of speech by writings and slogans on placards which they carried up and down the streets in front of the stores. This was certainly true in the AVENT case and in both cases there is no evidence to show that they had been restrained in any manner in the exercise of this right. The use of the streets and sidewalks of the town and city con-

cerned had been u. lized by Petitioners in the AVENT case and there is no reason to believe that any restraints would have been placed upon Petitioners in the exercise of free speech in any proper place. Of course, free speech is not a mighty shield that insulates a person from liability in all types of criminal conduct. Such a logic would extend free speech as a protection from the penalty of murder and would act as a complete and conclusive defense for the commission of all criminal acts. This is explained by a paragraph in KOVACS v. COOPER, 336 U. S. 77, where this Court said:

> "Of course, even the fundamental rights of the Bill of Rights are not absolute. The SAIA case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, SCHENCK v. UNITED STATES, 249 U. S. 47, 52, 63 L. Ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.'
>
> "Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

In the case of MILK WAGON DRIVERS UNION v. MEADOWMOOR DAIRIES, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed 836, the Court sustained an injunction against picketing where there was a history of past violence against a plea of freedom of speech and distinguished the case from that of THORNHILL v. ALABAMA, cited by the Petitioners, and said:

> "This is precisely the kind of situation which the Thornhill opinion excluded from its scope. 'We are not now

concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U. S. 105, 84 L. Ed. 1104, 60 S. Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coersive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

We shall not burden the Court with further citations from case law but it is sufficient to say that the injuctions sustained by this Court in labor disputes where violence and destruction of property were involved are certainly not constitutionally invalid because those who were engaged in picketing carried banners and mottoes and other writings in the exercise of communications and freedom of speech.

The case of MARSH v. ALABAMA, supra, is no exception to this rule. The defendants in the MARSH case were distributing religious literature and engaged in talking to persons on the streets of a company-owned town. They were not in stores interfering with the businesses of private proprietors. The Supreme Court of the United States simply said that where a company owned the streets and sidewalks the people of the town were compelled to use them in community affairs, that these streets and sidewalks were constitutionally dedicated to the public in the same manner as the streets of a municipal corporation.

## IV

## CONCLUSION

This Court in these cases is being asked to take a step which has never before been taken with reference to the use and enjoyment of property rights. To grant the request of the Petitioners opens the door to the socialization of all property and would mean that while a proprietor may have the privilege of holding the bare legal title yet the property would be subjected by the State to so many social demands that it would be almost analogous to property held in the corporative state organized and administered for awhile by Mussolini. Petitioners realize that their logic, as derived from their premises, leads to great extremes and they try to hedge against these extremes. For example, must the Petitioners be given entrance to the office of the manager and must they be allowed to go to the stockroom? Suppose the clerks tell Petitioners that they do not have certain articles and the Petitioners think they can find some of the articles in the stockroom, can they go to the stockroom over the protest of the management? Suppose private properietors are compelled to sell to Petitioners, at what price must they sell? If a private properietor sold articles or food to his friends at no cost or at a cheaper rate than usual, would this violate Petitioners' civil rights? Under their own theory, why should not Petitioners be allowed to enter into any private home they desire so long as they say that they are protesting and exercising free speech? The Petitioners' request should not be granted unless the Court thinks we should have a completely socialized state. There should be left to an individual some property rights that he can call his own or else why should we have the institution of private property. We ask the Court not to take such a step and in this connection we again remind the Court of the langauage this Court used in civil rights cases (109 U.S. 3) when it said:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable

concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected."

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 11

JOHN THOMAS AVENT, *et al.*,

*Petitioners,*

—v.—

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 11

JOHN THOMAS AVENT, *et al.*,

*Petitioners,*

—v.—

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

## BRIEF FOR PETITIONERS

### Opinion Below

The opinion of the Supreme Court of North Carolina (R. 73) is reported at 253 N. C. 580, 118 S. E. 2d 47 (1961).

### Jurisdiction

The judgment of the Supreme Court of North Carolina was entered January 20, 1961 (R. 90). On April 4, 1961, time for filing a petition for writ of certiorari was extended by the Chief Justice to and including May 4, 1961 (R. 91). The petition was filed on that date. June 25, 1962, the petition for writ of certiorari was granted (R. 92). Jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1257(3), petitioners having asserted below

and claiming here denial of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

## Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves North Carolina General Statutes, §14-134:

> Trespass on land after being forbidden. If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days.

## Questions Presented

Petitioners have been arrested, convicted, and sentenced to prison for refusal to obey an order to leave the lunch counter in a store open to the public, including Negroes. This order was given to enforce a custom of the community, generated by a massive body of state segregation law. The premises are extensively licensed and regulated by the State of North Carolina and the City of Durham. North Carolina has failed to accord Negroes the right of equal access to public accommodations.

### I.

A. May North Carolina, compatibly with the Fourteenth Amendment, make petitioners the target of a prosecution under its trespass laws when the articulated rationale of

the prosecution is, according to North Carolina's highest court, to enforce "the clear legal right of racial discrimination" of the S. H. Kress Corporation?

B. Are not these criminal trespass prosecutions, in any event, incompatible with the Fourteenth Amendment because they constitute purposeful state enforcement of a custom of racial discrimination—a custom which is itself the carefully nurtured fruit of decades of segregation required by state law?

C. Is not the degree of supervision and control which the State of North Carolina and the City of Durham exercise over the S. H. Kress lunch counter business so extensive a form of state involvement that, given the circumstances of A and B, *supra*, North Carolina has failed in its obligation to afford equal protection of the laws?

D. In addition to considerations set forth above, is not the property right which S. H. Kress and Co. has asserted —the right to discriminate racially in a single portion of a store open to the general public—so inconsequential to the main core of its proprietary interest, that the State may not compatibly with the Fourteenth Amendment, enforce that right by its criminal laws?

E. In view of the fact that North Carolina denies protection to Negroes against racial discrimination in public accommodations, do not the circumstances set forth above establish a denial of equal protection of the laws?

## II.

The trespass statute under which petitioners were convicted forbids only entry without license. Petitioners were invited to do business in the store and were ordered to

leave only because they sought nonsegregated service at the lunch counter, the only racially segregated counter in the store. The North Carolina Supreme Court has for the first time unambiguously held that the statute under which petitioners were convicted makes criminal refusal to leave after an invitation to enter. Does not this conviction, therefore, violate the due process clause of the Fourteenth Amendment in that the statute upon which it rests gave petitioners no fair and effective warning that their actions were prohibited?

## III.

Is not North Carolina denying petitioners freedom of speech secured by the Fourteenth Amendment by using its criminal trespass laws as a device to stop petitioners from urging S. H. Kress and Company to abandon its discrimination practices?

## Statement

Petitioners, five Negro students from North Carolina College and two white Duke University students, were arrested for a "sit-in" demonstration at the S. H. Kress Department store lunch counter in Durham, North Carolina (R. 20-21). They were charged with trespass under North Carolina General Statutes, Chapter 14, Section 134, which prohibits going or entering upon land after being forbidden to do so (R. 1-10).

On May 6, 1960, petitioners, some of whom in the past had been regular customers, bought small stationery items at counters on the first floor of the Kress Department Store (R. 35, 39, 41-43, 46, 47, 48). Negroes and whites were served without discrimination in all fifty departments ex-

cept at the lunch counter portion where patrons sit (R. 22-23). There Negroes were barred although a "stand-up" section serviced whites and Negroes together (R. 22-23). After making their purchases, petitioners proceeded to the basement through the normal passageway bordered by an iron railing, and took seats at the lunch counter (R. 37, 40, 42, 44, 46, 47, 48). No signs at any entranceway or counter barred or limited Negro patronage (R. 22-23). A sign in the basement luncheonette limited it to "Invited Guests and Employees Only" (R. 23). No further writing elucidated its meaning; but the manager testified that while invitations were not sent out, white persons automatically were considered guests, but Negroes and whites accompanied by them were not (R. 22).

The racial distinction was based solely on the custom of the community: The manager testified, "It is the policy of our store to wait on customers dependent upon the custom of the community . . . It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs 'Invited Guests and Employees Only'" (R. 23). He further stated that if Negroes wanted service, they might obtain it at the back of the store or at a stand-up counter upstairs (R. 22).

As petitioners took seats, the manager approached and asked them to leave (R. 21). One petitioner, Joan Nelson Trumpower, a white student, had already received and paid for an order of food (R. 42). When she attempted to share it with Negroes on either side of her, the manager asked her to leave (R. 23, 42). He never identified himself, however, as the manager or as a person with authority to ask them to leave (R. 42).

While petitioners remained seated awaiting service, the manager called the police to enforce his demand (R. 21).

An officer promptly arrived and asked them to leave (R. 21). Upon refusal the officer arrested them for trespass (R. 21). At all times petitioners were orderly and, when arrested, offered no resistance (R. 22, 26).

Petitioners were members of an informal student group with a program of protesting segregation (R. 36, 41, 43, 44). They had organized and led picketing at the store to protest its policy of fully accepting the business of Negro patrons while refusing them service at the sit-down lunch counter (R. 36, 40-41, 44-45). The picketing occurred at various times from February 1960 until the arrest on May 6, 1960 (R. 44). Some of the petitioners had requested and had been denied service on previous occasions at the lunch counter, and on the day of the arrests, they continued to request service in hope that their protests would be successful (R. 37, 40-41, 49). On the previous day petitioners attended a meeting to discuss the sit-in demonstrations, where it was agreed that they would trade in the store as customers as in the past, and then seek service on the same equal basis at the lunch counter (R. 49).

They were indicted for trespass in the Superior Court of Durham County, the indictments stating that each petitioner

> "with force and arms . . . did unlawfully, willfully, and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co., store . . . said S. H. Kress and Co., owner being then and there in actual and peaceable possession of said premises under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress

> and Co., to leave that part to the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that . . . [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state."

Each indictment identified each petitioner as "CM" (colored male), "WM" (white male), "CF" (colored female), or "WF" (white female) (R. 2, 3, 5, 6, 7, 9, 10). Petitioners made motions to quash the indictments raising defenses under the Fourteenth Amendment to the United States Constitution. These were denied (R. 11-15). To the indictments they entered pleas of not guilty (R. 15).

Various federal constitutional defenses were made throughout and at the close of trial, but were overruled (R. 12, 15, 26-34, 50, 66-67). Petitioners were found guilty (R. 15-16). Petitioners Coleman, Phillips, and Callis Napolis Brown were sentenced to 30 days imprisonment in the common jail of Durham County to work under the supervision of the State Prison Department (R. 17-18). Petitioner Streeter was sentenced similarly to 20 days (R. 19). Petitioner Avent was sentenced to 15 days in the Durham County jail (R. 16). Prayer for judgment was continued in the cases of Shirley Mae Brown and Joan Harris Nelson Trumpower (R. 16, 17).

Error was assigned again raising and preserving federal constitutional defenses (R. 67-69), and the case was heard by the Supreme Court of North Carolina, which affirmed the convictions on January 20, 1961 (Clerk's Certificate following Court's Opinion).

## Summary of Argument

### I.

The court below held that it was enforcing "the clear legal right of racial discrimination of the owner." But, while in some circumstances there may be a personal privilege to make racial distinctions, its limit is reached when the person exercising it turns to the state for assistance. Judicial and police action are no less forbidden State action when invoked to enforce discrimination initiated by an individual. Any suggestion that private rights, in the sense that they invoke considerations of privacy, are involved is farfetched. Kress's has been open to the public in general. The management did not assert the corporation's own preference for a segregation policy, but rather the custom of the community. While considerations of privacy may be meaningful in determining the reach of some constitutional liberties, in this case the right to freedom from State imposed racial discrimination is not in competition with any interest the State might have in protecting privacy.

At the very least, however, the State may not enforce racial discrimination which expresses deep-rooted public policy. The record here conclusively shows that this is what happened in this case. Such customs are a form of State action. But beyond this the segregation customs in this case were generated by a host of State segregation laws. The North Carolina Advisory Committee to the United States Commission on Civil Rights has concluded that, "so long as these compulsory statutes are on the books, some private citizens are more than likely to take it upon themselves to try to enforce segregation." Scholarship establishes the crucial role which government, politics, and law have played in creating segregation customs.

But the State-enforced, State-created community custom of segregation in this case is even more invidious because it has taken place in an establishment in which the State has been deeply involved by requiring extensive licensing and regulation. State involvement in such an enterprise precludes State enforcement of segregation therein by means of arrests and prosecutions for trespass.

The holding below that the State merely was in a neutral fashion enforcing an inalienable, sacred, property right is clearly incorrect. States can, and have, constitutionally forbidden property owners to discriminate on the basis of race in public accommodations. North Carolina has not inhibited itself from requiring racial segregation on private property. The more an owner for his advantage opens his property for use by the public in general, the more do his rights become circumscribed by the constitutional and statutory rights of those who use it.

Property is a bundle of rights and privileges granted by the State. That portion of the rights which constitute Kress's property, which Kress asserts here, and which the State has enforced is to control the conduct and association of others. This type of property right historically has never been unrestrained throughout the whole range of efforts to assert it. Restraints on that power are but a manifestation of the fact that law regularly limits or shapes property rights where they may have harmful public consequences. Other characteristics of the asserted right to racially discriminate in this case are that no claim of privacy has been intruded upon; that petitioners sought only to use the premises for their intended function; that segregation was required only in a single part of an establishment open to the general public, to which petitioners were admitted and in which they were invited to trade freely except at the lunch counter in question. This separable sliver in the entire

complex of powers and privileges which constitutes Kress's property is hardly entitled to legal protection when it collides with the Equal Protection Clause of the Fourteenth Amendment, whose purpose was an end of discrimination against the Negro.

Moreover, the *Civil Rights Cases* assumed that the State law provided "a right to enjoy equal accommodations and privileges . . . one of the essential rights of the citizen which no state can interfere with." The failure to provide such rights can deny the equal protection of the laws. One member of the Court which decided the *Civil Rights Cases* previously had written that denial included omission to protect as well as the omission to pass laws for protection. Legislators concerned with the scope of the Fourteenth Amendment expressed similar views. The *Civil Rights Cases* were decided on the assumption that the States in question protected those rights. It is doubtful that the result would have been the same if then, as today in North Carolina, the States actively interfered with the right of equal access to public facilities. No State may abdicate its responsibilities by ignoring them; and where a State by its inaction has made itself a party to the refusal of service and has placed its power and prestige behind discrimination, convictions such as those obtained in this case must fall.

## II.

The statute applied to convict petitioners was unreasonably vague and thereby offends the due process clause of the Fourteenth Amendment in that although the statute, by terms, prohibits only the act of going on the land of another *after* being forbidden to do so, the court below has expansively construed the law to cover petitioners' act of remaining on the property after being directed to leave. This strained construction of the plain words of the law

converts the common English word "enter" into a word of art meaning "trespass" or "remain" and transforms the statute from one which fairly warns against one act into a law which fails to warn of conduct prohibited. The law is invalid as its general terms do not represent a clear legislative determination to cover the specific conduct of petitioners, which is required where laws deter the exercise of constitutional rights.

## III.

The conviction violates petitioners' right to freedom of expression as secured by the due process clause of the Fourteenth Amendment against state infringement. Petitioners' action here, a sit-in, is a well recognized form of protest and was entirely appropriate to the circumstances, including the use to which the privately owned property involved had been dedicated by the owner. There were no speeches, picket signs, handbills, or other forms of expression which might possibly be inappropriate to the time and place. There was merely a request to be permitted to purchase goods in the place provided for such purchases. The expression was not in such circumstances or of such a nature as to create a clear and present danger of any substantive evil the State had a right to prevent. The arrests improperly stifled a protest against racial discrimination.

# ARGUMENT

## I.

## North Carolina in Enforcing What Its Highest Court Has Denominated a "Clear Legal Right of Racial Discrimination" Has Denied to Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

### A. Arrest, Conviction, and Sentence to Prison for Trespass for Having Violated the S. H. Kress Co.'s Requirement of Racial Segregation at Its Public Lunch Counter Deny Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

In affirming the conviction below the North Carolina Supreme Court has twice said that it was merely enforcing "the clear legal right of racial discrimination of the owner" (R. 82, 83). One need turn no further than to *Shelley* v. *Kraemer*, 334 U. S. 1, to see that it has been plain—if any constitutional doctrine can be called plain—that there is no "clear legal right of racial discrimination." To the contrary, while in some circumstances there may be a personal privilege of making racial distinctions, the limit of that privilege certainly is reached when the person exercising it turns to state instrumentalities for assistance. Racial discrimination is constitutionally inadmissible when "the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.[1]

[1] Segregation has been forbidden in schools, *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; parks and recreational facilities, *Mayor, etc. of Baltimore* v. *Dawson*, 350 U. S. 877; *Holmes* v. *Atlanta*, 350 U. S. 879; *New Orleans City Park Improvement Ass'n* v. *Detiege*, 358 U. S. 54; and airports, *Turner*

"[I]t has never been suggested that state court action is immunized from the operation of [the Fourteenth Amendment] . . . simply because the act is that of the judicial branch of the state government." *Shelley* v. *Kraemer*, 334 U. S. at 18. See also *Barrows* v. *Jackson*, 346 U.S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 499, 463. Police action which segregates denies Fourteenth Amendment rights. *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533 n. 1 (5th Cir. 1960); see also *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a prior agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions

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v. *Memphis*, 369 U. S. 350; *Henry* v. *Greenville Airport Comm'n*, 284 F. 2d 631 (4th Cir. 1960).

Segregation requirements have been prohibited in privately sponsored athletic contests, *State Athletic Comm'n* v. *Dorsey*, 359 U. S. 533; and in connection with privately owned transportation facilities, *Gayle* v. *Browder*, 352 U. S. 903; *Evers* v. *Dwyer*, 358 U. S. 202; *Bailey* v. *Patterson*, 369 U. S. 31; *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960). A State law construed to authorize discrimination by privately owned restaurants was thought to be "clearly violative of the Fourteenth Amendment" by Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. Three dissenting Justices agreed this would follow if that were a proper construction of the law, 365 U. S. 715, 727, 729. State laws requiring segregation in the use and occupancy of privately owned property were invalidated in *Buchanan* v. *Warley*, 245 U. S. 60, and *Harmon* v. *Tyler*, 273 U. S. 668.

Among the numerous cases forbidding segregation in publicly owned but privately leased facilities, see *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *Memphis*, 369 U. S. 350; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding, 202 F. 2d 275; *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. *sub nom. Casey* v. *Plummer*, 353 U. S. 924.

of state power in all forms." *Shelley* v. *Kraemer*, 334 U. S. at 20. See also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

In the *Civil Rights Cases*, 109 U. S. 3, 17, this Court held outside the Amendment's scope individual action "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" or "not sanctioned in some way the State," 109 U. S. at 17. The opinion referred to "State action of every kind" inconsistent with equal protection of the laws, *id.* at 11; to "the operation of State laws, and the action of State officers exec[illegible] or judicial," *id.* at 11. Repeatedly, the opinion held within the scope of the Fourteenth Amendment "State laws or State proceedings," *id.* at 11; "some State action," *id.* at 13; "acts done under State authority," *id.* at 13; "State action of some kind," *id.* at 13; and the opinion pointed out that "States are forbidden to legislate or act in a particular way," *id.* at 15. The Fourteenth Amendment is "addressed to counteract and afford relief against State regulations or proceedings," *id.* at 23.

Racial discriminations "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Certainly in this case the State is more deeply implicated in enforcing that racism so odious to our Constitution than it was in *Shelley* v. *Kraemer*. For here, the State has not merely held its courts open to suitors who would seek their aid in enforcing discrimination, but has taken an active initiative in prosecuting petitioners criminally and sentencing them to prison terms.

Moreover, petitioners here assert not merely the generalized constitutional right found in the equal protection clause of the Fourteenth Amendment to be free from racial dis-

crimination. 42 U. S. C. 1981 provides: "'All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * * .'" 42 U. S. C. 1982 provides: "'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase * * * real and personal property.'" Referring to similar statutory provisions involving jury service, this Court has declared: "'For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination.'" *Fay* v. *New York*, 332 U. S. 261, 282-283.

The opinion below stresses that Kress's is "a *privately* owned corporation" and "in the conduct of its store in Durham is acting in a purely *private* capacity" (R. 77). But "private" is a word of several possible meanings. To the extent that concepts of privacy play a part in defining rights here at issue, Kress's privacy should be seen as it really is. Any suggestion that some exception to the *Shelley* rule should be made for a corporation which has sought state aid in enforcing racial discrimination in its enterprise open to the general public for profit, because somehow the inviolability of a private home may be impaired, is without merit. This prosecution is not asserted to be in aid of any interest in privacy of the property owner, for it has opened the store to the public in general. Moreover, the proprietor has not expressed *its* preference, rather it has sought state aid to enforce the custom of the community. Were a state to enforce a trespass law to protect a real interest in some private aspect of property a different

result might be required because of the importance of the right of privacy which finds firm support in the decisions of this Court. Examples where such countervailing considerations have applied are cases such as *Breard* v. *Alexandria*, 341 U. S. 622, 626, 644, and *Kovacs* v. *Cooper*, 336 U. S. 77. On the other hand a case such as *Martin* v. *Struthers*, 319 U. S. 141, is an instance where even considerations of privacy did not overcome a competing constitutional right like freedom of religion.[2] In this case the right to freedom from state imposed racial discrimination does not compete with any interests the state may have in protecting privacy.[3]

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[2] And see *Watchtower Bible and Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948), in which the New York courts distinguished between the right to solicit in the streets of a large scale housing project and to go, without invitation, into the hallways to visit private apartments.

[3] To weigh considerations of privacy in a case involving racial discrimination would comport with the views of the framers of the Fourteenth Amendment. During the debate on the bill to amend the *Civil Rights Act* of 1866, 14 Stat. 27, which served as the precursor to the *Civil Rights Act* of 1875, 18 Stat. 335, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of *Equality;* nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality in the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say that *Equality in all institutions created or regulated by law* is as little a question of society." (Emphasis added). After quoting Hollingshed, Story, Kent, and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: 'As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it

**B. Certainly, at Least, the State May Not by Its Police and Courts Enforce Such Segregation When It Stems From a Community Custom of Segregation Which Has Been Generated by State Law.**

Certainly, at the very least, the well established rule—that states may not enforce racial discrimination—discussed in part I, applies where the racial segregation is not a matter of private choice, but expresses deep-rooted public policy.

That segregation was a "custom of the community" (R. 22) is stated expressly in the record, although one hardly need turn there to learn a fact concerning conditions in society so well known. *Child Labor Tax Case*, 259 U. S. 20, 27 (Chief Justice Taft). Kress's manager, however, made clear that the store's segregation policy was merely that of the community.

> "It is the policy of our store to wait on customers dependent upon the customs of the community. . . . We have a stand-up counter on the first floor, and we serve Negroes and whites at that stand-up counter. We also serve white people who are accompanied by Negroes at the stand-up counter. . . . Even if Negroes accom-

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be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess. 382-383 (1872).

It is not unreasonable that considerations of privacy should weigh so heavily. The right of privacy against intrusion on one's premises or into one's personal affairs, 4 Blackstone's Commentaries Ch. 13, §5(6) (Wendell's ed. 1850), was recognized at common law, and is recognized generally in American law. See A. L. I., Restatement of Torts, §867 (1939). This Court has recently reiterated that the due process clause protects privacy against intrusion by the States. *Mapp* v. *Ohio*, 367 U. S. 643, 654, 655; *Wolf* v. *Colorado*, 338 U. S. 25, 27-28; Cf. *Gilbert* v. *Minnesota*, 254 U. S. 325, 336 (Justice Brandeis dissenting); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464, 468.

panied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 16, 1960. . . . It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only" (R. 22-23).

The *Civil Rights Cases* speak of "customs having the force of law," 109 U. S. 3, 16, as a form of state action.[4] Here, as in *Garner* v. *Louisiana*, 368 U. S. 157, "segregation is basic to the structure of . . . [the state] as a community; the custom that maintains it is at least powerful as any law." (Mr. Justice Douglas concurring, at 181).[5]

But this custom of North Carolina is not separate from law. It has roots in and fills interstices of a complex network of state mandated segregation. The North Carolina Advisory Committee to the United States Commission on Civil Rights has concluded that "so long as these compulsory statutes are on the books, some private citizens are more than likely to take it upon themselves to try to enforce segregation."[6]

Most of this law was enacted about the turn of the twentieth century.[7] These state and city imposed require-

[4] See also 109 U. S. at 21: "long custom, which had the force of law . . ."

[5] This Court has recognized that "'Deeply embedded traditional ways of carrying out state policy . . .'—or not carying it out—'are often tougher and truer law than the dead words of the written text'. *Nashville C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369." *Poe* v. *Ullman*, 367 U. S. 497, 502.

[6] A discussion and presentation of this legislation may be found in North Carolina Advisory Committee to the United States Commission on Civil Rights, *Statutes and Ordinances Requiring Segregation by Race* (March 9, 1962) (mimeographed) (hereafter cited as North Carolina Advisory Committee).

[7] North Carolina Advisory Committee 23.

ments govern not only activities furnished by the state but privately-owned facilities as well. The subordinate role to which the segregation laws relegate Negroes is well illustrated by the national guard statute, N. C. Gen. Stat. §127-6: "No organization of Colored Troops shall be permitted where White troops are available, and while permitted to be organized, colored troops shall be under command of white officers."

While the state has repealed statutes requiring segregation in the public schools, school segregation continues to be enforced by other means.[8] Mental institutions,[9] orphanages,[10] and schools for the blind and deaf,[11] must be segregated as must prisons,[12] and training schools.[13]

Separate tax books must be kept for white, Negro, Indian and corporate taxpayers.[14]

State law requires racial distinctions where municipalities take possession of existing cemeteries.[15] Some city

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[8] Under the North Carolina Pupil Assignment Law "without a single exception, the boards have made initial assignment of white pupils to previously white schools and Negro children to previously Negro schools." United States Commission on Civil Rights, *The Fifty States Report* 477 (1961).

[9] G. S. 122-3-6.

[10] G. S. 116-138 to -142.

[11] G. S. 116-109, -120, -124.

[12] G. S. 148-43.

[13] G. S. 134-79 to -84; G. S. 134-84.1 to -84.9. On the various forms of segregation in health care, among patients as well as professional personnel, in public as well as private facilities, see Equal Protection of the Laws Concerning Medical Care in North Carolina, Subcommittee on Medical Care of the North Carolina Advisory Committee to the United States Commission on Civil Rights (undated) (mimeographed).

[14] G. S. 105-323.

[15] G. S. 65-37.

ordinances designate particular cemeteries for colored persons and specific burial grounds for white citizens;[16] others note simply that places of interment are to be marked for Negroes or for Caucasians.[17] Separate funeral homes must be maintained throughout the state.[18]

Municipalities also have enacted legislation requiring segregation. For example, a Charlotte ordinance, Article I, Section 5, Charlotte City Code, delineates the metes and bounds of the area within which its Negro police have authority. See North Carolina Advisory Committee to the United States Commission on Civil Rights, *op. cit. supra*, at 3. The Director of the Department of Conservation and Development, while not requiring segregation in state parks, discourages Negroes from enjoying white facilities. *Id.* at 8.

North Carolina has also undertaken extensively to regulate so-called "private" relationships. There remains on the books of North Carolina (although invalid in view of decisions of this Court, *Morgan* v. *Virginia*, 328 U. S. 373; *Gayle* v. *Browder*, 352 U. S. 903) a statute requiring racial segregation in passenger trains and steam boats. G. S. 60-94 to -97. The Utilities Commission is directed by G. S. 62-44 and G. S. 62-127.71 to require separate waiting rooms. Street cars must by statute be boarded white from the front and colored from the rear. G. S. 60-135 to -137. The Corporation Commission has been upheld in requiring enforced segregation on motor buses. *Corporation Comm'n* v. *Transportation Committee*, 198 N. C. 317, 320, 151 S. E. 648, 649 (1930). In that opinion Judge Clarkson emphasized

[16] Charlotte City Code, ch. 7, sec. 7-9, 7-56; Sec. 7-19 of the Lumberton Code; Sec. 8-1, Burlington Code.

[17] Sec. 6-42, Winston-Salem Code; Sec. 7-9, Charlotte City Code.

[18] G. S. 90-212.

that separation or segregation "has long been the settled policy" of North Carolina. See G. S. 60-139; *State* v. *Johnson*, 229 N. C. 701, 51 S. E. 2d 186 (1949).

Persons engaged in businesses employing more than two males and females must segregate on the basis of race in toilet facilities. G. S. 95-48. See G. S. 72-46 (1941). Persons operating restaurants and other food handling establishments are required to obtain a permit from the State Board of Health. G. S. 72-46. The State Board inspector's official form contains as one of the criteria on which restaurants are graded the factor of whether toilet facilities are "adequate for each sex and race." North Carolina Advisory Committee Report 18.

Fraternal orders may not be authorized to do business in North Carolina if white and colored persons are members of the same lodge. G. S. 58-267.

Marriage is forbidden between persons of the Negro and white races by the Constitution of North Carolina, Art. XIV, §8 (1868); G. S. 14-181 and G. S. 51-3.

Various statutes and ordinances throughout North Carolina require segregation in taxicabs, carnivals, other places of amusement, and restaurants. North Carolina Advisory Committee Report 15, 17-20. Among these ordinances is one of the City of Durham requiring that in public eating places where persons of the white and colored races are permitted to be served, there shall be private, separate rooms for the accommodation of each race. *Id.* at 18.[19]

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[19] The state did not rely on the ordinance at trial, nor was it adverted to on appeal. Heretofore, the North Carolina Supreme Court has declined to notice municipal ordinances not introduced into evidence at trial. See *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958).

C. Vann Woodward has written of the relative recency of the segregation system in America:

> Southerners and other Americans of middle age or even older are contemporaries of Jim Crow. They grew up along with the system. Unable to remember a time when segregation was not the general rule and practice, they have naturally assumed that things have 'always been that way.' Or if not always, then 'since slavery times,' or 'since The War,' or 'since Reconstruction.' Some even think of the system as existing along with slavery. Few have any idea of the relative recency of the Jim Crow laws, or any clear notion of how, when, and why the system arose. Woodward, The Strange Career of Jim Crow, vii-viii (1955).

Even after the end of Reconstruction and during the so-called period of "Redemption" beginning around 1877, the rigid segregation system characteristic of later years had not become the rule. The history of segregation makes clear that during the early years after Reconstruction Negroes were unsegregated in many public eating establishments in the South. *Id.* at 18-24. The Jim Crow or segregation system became all-pervasive some years later as a part of the aggressive racism of the 1890's and early 1900's, including Jim Crow laws passed at that time, which continued until an all-embracing segregation system had become the rule. In this way law shaped custom. *Id.* at ch. II.

Professor Woodward writes:

> At any rate, the findings of the present investigation tend to bear out the testimony of Negroes from various parts of the South, as reported by the Swedish writer Gunnar Myrdal, to the effect that the Jim Crow statutes were effective means of tightening and freezing—

in many cases instigating—segregation and discrimination. The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing. *Id.* at 90-91.

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It has also been seen that their [Negroes] presence on trains upon equal terms with white men was once regarded as normal, acceptable, and unobjectionable. Whether railways qualify as folkways or stateways, black man and white man once rode them together and without a partition between them. Later on the stateways apparently changed the folkways—or at any rate the railways—for the partitions and Jim Crow cars became universal. And the new seating arrangement came to seem as normal, unchangeable, and inevitable as the old ways. And so it was with the soda fountains, eating places, bars, waiting rooms, street cars, and circuses. *Id.* at 91-92.

Thus the system of segregation in places of public accommodations, has from the beginning been a product of government, politics, and law.

This Court has recognized how law may work its effect in ways other than requiring obedience to statutory text: In *Pollock v. Williams*, 322 U. S. 4, the Court discharged the petitioner on a writ of habeas corpus because a statutory presumption had induced a plea of guilty:

The State contends that we must exclude the prima facie evidence provision from consideration because in fact it played no part in producing this conviction. *Id.* at 13.

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> We cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. *Id.* at 15.

And see—*Engel* v. *Vitale*, 370 U. S. 421, 431 (indirect coercive pressure upon religious minorities). As was said in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463, "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold." [20]

Therefore it hardly can be urged that the management was acting privately, unsanctioned by the state. Apart from state support of management's decision to segregate, that decision itself represented the policy of North Carolina induced and nourished by its laws. As Mr. Justice Douglas wrote in *Garner* v. *Louisiana*, 368 U. S. 157, 181, the proprietor's "preference does not make the action 'private,' rather than 'state,' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise."

**C. *A Fortiori*, the State May Not Arrest and Convict Petitioners for Having Violated a Segregation Rule Which Stems From a State Generated, Community Custom of Segregation in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers.**

The nature of the State's involvement—demonstrated by extensive regulation and licensing—in the premises where

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[20] This Court has struck down state action which would enable private individuals to seek reprisals against persons opposed to racial discrimination, *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449. *A fortiori*, the link between state *requirements* of segregation and the conduct it fosters—not merely permits—should be recognized.

petitioners were arrested for violating the state-generated community custom shows even further the invalidity of the judgment below. This discrimination has been enforced in an area of public life with which the State is so intimately involved that Kress's lunch counter business is by law required to be extensively licensed and regulated. The very publicness of the enterprise is demonstrated not only by the fact that Kress serves the general public, but by the interest which the State has demonstrated in that service. In addition to the detailed regulation of business corporations (including foreign corporations)[21] North Carolina law requires various licenses,[22] imposes taxes,[23] and authorizes state and local health regulation[24] of this type of business. As Mr. Justice Douglas wrote in *Garner v. Louisiana*, 368 U. S. at 183-84:

> A state may not require segregation of the races on conventional public utilities any more than it can segregate them in ordinary public facilities. As stated by the court in Boman v Birmingham Transit Co. (CA 5 Ala) 280 F2d 531, 535, a public utility "is doing some-

[21] North Carolina General Statutes, §55-140.

[22] A state license is required for the operation of a soda fountain G. S. §55-79 or a chain store G. S. §105-98. A license is required for all establishments selling prepared food G. S. §105-62. Separate licenses are required to sell other items, such as tobacco products, G. S. §105-85 or records and radios, G. S. §105-82.

[23] Retail stores must collect sales and use taxes for the state to keep their licenses to do business (G. S. §105-164.4-6).

[24] State law establishes an overlapping pattern of health regulations for restaurants. See N. C. Gen. Laws, Ch. 130 (1957). Section 13 of this chapter authorizes each county to operate a health department; local boards of health can make rules and regulations "not inconsistent with state law," Sec. 17(b). Both the State Board of Health and the Durham County Board of Health prescribe rules applicable to food service establishments. See State Board of Health Laws, Rules and Regulations; County of Durham Sanitary Code, Sec. 1.

> thing the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in Plessy v Ferguson, . . . advanced. Though a common carrier is private enterprise, "its work" he maintained is public. Id., at 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment.

In *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, this Court found sufficient governmental responsibility to require decision of a Fifth Amendment due process claim where the principal governmental involvement was a decision by a regulatory body to do nothing about private activity (radio broadcast on streetcars) it could have prohibited. The lunch counter in this case is also regulated by government, although perhaps not so closely as the streetcar company in *Pollak*. But this case has an element that the *Pollak* case did not, i.e., that government has done so much to encourage racial segregation in public life that it must share responsibility for the discriminatory rule.

And see *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192; *Nixon* v. *Condon*, 286 U. S. 73; *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831. In each of these cases, state initiative and licensing in establishing and maintaining the enterprise led to a holding or implication that the Fifth or Fourteenth Amendments forbid racial discrimination.

Here, indeed, is a case where the State "to some significant extent" in many meaningful "manifestations has been found to have become involved. . . . " *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

**D. No Essential Property of S. H. Kress and Co. Is Here at Issue; the Right to Make Racial Distinctions at a Single Counter in a Store Open to the Public Does Not Outweigh the High Purposes of the Fourteenth Amendment.**

The highest court of North Carolina has attempted to differentiate this case from others which have refused to sanction state enforcement of racial discrimination by asserting that it was merely neutrally enforcing a "fundamental, natural, inherent and inalienable" (R. 81) private property right, allegedly " 'a sacred right, the protection of which is one of the most important objects of government' " (R. 81). Referring to the claimed right to exclude petitioners the court below held, "white people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth" (R. 84).

This description of the property right cannot withstand analysis. First, the court below dealt with the alleged right of the property owner to racially discriminate as if it were inviolate, when actually, states can prohibit racial discrimination in public eating places without offending any constitutionally protected property rights.[25] And though the laws violate the Fourteenth Amendment, North Carolina has hardly hesitated in *imposing* the requirement of racial

[25] See *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; Konvitz & Leskes, A Century of Civil Rights 172-177 (1961).

segregation on private property owners.* Thus, of course, the asserted property right to treat the races as one desires on his property is very far indeed from an absolute or an inalienable right and has not even been so regarded by North Carolina. "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U. S. 1, 22, citing *Marsh v. Alabama*, 326 U. S. 501. Indeed, the Court said in *Marsh v. Alabama*, *supra*, at 506, that constitutional control becomes greater as property is more public in its use:

> The more an owner for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. Labor Board, 324 U. S. 793, 798, 802, n. 8.

Of course, the Fourteenth Amendment does not forbid a state to assist in the enforcement of property rights as such. Indeed, for an obvious example, the state has an obligation not to engage in or assist in the invasion of the privacy of the home. Considerations of privacy, discussed in more detail, *supra*, pp. 15-16, offer one useful basis for distinguishing between permissible and impermissible types of state action.

Since "property or ownership" is, as Mr. Justice Cardozo has written, a "bundle of privileges," *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582, or as stated elsewhere, "a group or bundle of rights" given by the state, Blodgett, *Comparative Economic Systems* 24 (1944), it matters a

*See pp. 20 to 21, *supra*, citing North Carolina laws requiring segregation on private property.

great deal which of the rights or privileges constituting Kress's property was enforced in this prosecution. Various characteristics of the property interest demonstrate that this case should not depart from the general rule that states may not support racial discrimination.

The asserted property interest is but a claimed right to control the conduct and associations of others. But this claimed right is clearly separable from other incidents of ownership of the property such as fixing prices, choosing merchandise for sale, setting hours of business, selling the business or closing it down, to name but a few.

The power to regulate the conduct and associations of others has never been an unrestrained property right. Illustrations include limitations that the law has placed on those who would use their property to control the conduct of donees, as by requiring divorce or separation,[27] or with respect to marriage,[28] restrictions compelling separation of a child from its parents,[29] and requirements controlling certain personal habits.[30]

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[27] Provisions requiring divorce or separation were held void in: *Dwyer* v. *Kuchler*, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934); *In Re Haight's Will*, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900); *Davidson* v. *Wilmington Trust Co.*, 23 Del. Ch. 1, 2 A. 2d 285 (Ch. 1938); *Winterland* v. *Winterland*, 389 Ill. 384, 59 N. E. 2d 661 (1945); *Hawke* v. *Euyhart*, 30 Neb. 149, 46 N. W. 422 (1890); *Cruger* v. *Phelps*, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897).

[28] Certain marriage clauses have been held ineffective, 6 Powell, *Real Property* ¶851; A. L. I., *Restatement of Property*, §424 (1944); *Maddox* v. *Maddox, Adm'r*, 52 Va. 804 (1954).

[29] Restrictions which compel the separation of a minor child from its parent have not been viewed with favor, 6 Powell, Real Property ¶858, at 64; *In Re Carpie's Estate*, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931); *In Re Forte's Will*, 149 Misc. 327, 267 N. Y. S. 603 (Surr. Ct. 1933); *In Re Rainey's Estate*, 161 Misc. 626, 292 N. Y. S. 476 (Surr. Ct. 1936).

[30] *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (1918) (condition that conveyee's husband abstain

The power to impose restraints on alienation has been severely limited by courts and legislatures.[31] Restrictive covenants have been limited by common law.[32] Their enforcement in courts of equity[33] and courts of law[34] has been forbidden by the Fourteenth Amendment where race was the reason for the restriction. And, of course, the rule against perpetuities is of ancient lineage.[35]

A business man is not always free to set his own prices. Fair trade acts on the one hand, approved by the Miller-Tydings Act amendment of §1 of the Sherman Act, 15 U. S. C. §1, require some businessmen to sell at fixed prices. Anti-trust concepts on the other hand, originating in the common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899), and embodied in the statutes of the United States, Robinson-Patman Act, 15 U. S. C. §13 *et seq.*; Clayton Act, 15 U. S. C. §12 *et seq.*; Sherman Anti-Trust Act, 15 U. S. C. §§1 *et seq.*, have condemned price discrimination, price fixing, and conspiracies to fix resale prices. The right to select customers

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from tobacco and liquor held void); cf. *D'Arcangelo* v. *D'Arcangelo*, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945), (legatee must employ testator's brother as bus driver, at designated salary for a corporation in which legatee had received an interest; invalidated).

[31] Gray, *Restraints on the Alienation of Property* §259 (2d ed. 1895); A. L. I., *Restatement of Property*, Div. 4, Social Restrictions Imposed Upon the Creation of Property Interests 2121 (1944); Browder, *Illegal Conditions and Limitations: Miscellaneous Provisions*, 1 Okla. L. Rev. 237 (1948).

[32] *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

[33] *Shelley* v. *Kraemer*, 334 U. S. 1.

[34] *Barrows* v. *Jackson*, 346 U. S. 249.

[35] Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942); 6 Powell, *Real Property*, ¶¶759, 827; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938).

has also been curtailed by the antitrust laws,[36] as well as common law, and even the right of a single trader has been greatly limited.[37]

Numerous statutes limit property holders in their power to refuse to sell or rent on grounds of race or color[38] or to refuse to serve patrons in public accommodations on the grounds of race or color.[39] Historically, the right to select

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[36] *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, (1959). *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143 (1951).

[37] *United States* v. *Colgate*, 250 U. S. 300 (1919); See *U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); Rankin, *The Parke, Davis Case*, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961).

[38] Cal. Health & Safety Code §35740; Mass. G. L. c. 151B, §6 (Supp. 1961); N. J. Stat. Ann. §18:25-4 (Supp. 1961); Wash. Rev. Code §§49.60.030, 49.60.040 (1957); Cal. Civil Code, §51 (Supp. 1961); Colo. Rev. Stat. Ann. §§69-7-1, to 69-7-7 (Supp. 1960); Conn. Stat. Rev. §53-35 (Supp. 1960); Mass. Gen. L. c. 151B, §4 (Supp. 1961), as amended by Acts, 1961, c. 128; Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective in 12/31/62; Ore. Rev. Stat. §659.033 (1959); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. Y. Executive Law, §290 (Supp. 1962); Pa. Stat. Ann., tit. 43, §953 (Supp. 1961). Cases holding some of the ordinances and statutes constitutional are: *Levitt & Sons, Inc.* v. *Division Against Discrimination*, 31 N. J. 514, 158 A. 2d 177 (1960); *Mass. Comm'n Against Discrimination* v. *Colangelo*, 30 U. S. L. W. 2608 (Mass. 1962); *State Comm'n Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958).

[39] Cal. Civil Code, §§51-52 (Supp. 1961); Colo. Rev. Stat. Ann. 25—1—1 *et seq.* (1953); Conn. Gen. Stat. Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 *et seq.* (Supp. 1960); Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Mass. Gen. L. c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101, 102 (1943); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948), Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961);

customers has been limited by common law and statute.[40] It is well known that innkeepers and carriers do not have freedom arbitrarily to select or reject patrons. Beale, *The Law of Innkeepers and Hotels* (1906).

The foregoing limitations on the power to control the conduct and associations of others describe particular examples of the general principle that "property rights" are not "sacred" and "inalienable" in the sense that common law, statute, and constitution may not limit or shape them where they have harmful public consequences. Further examples indicate different aspects of this thoroughly settled, fundamental legal truth. Property owners have been compelled to destroy valuable cedar forests which harbored fungus threatening neighboring apple orchards,[41] to spend funds to install fire extinguishing equipment,[42] to limit the

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Ohio Rev. Code §4112.02(G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann., tit. 18, §4654, as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); Vt. Stat. Ann., tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961).

[40] Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong., 1st Sess., Select Committee on Small Business (1957); Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Statute of Labourers, 25 Ed. III, Stat. 1 (1350) (no one could refuse to practice his calling to whomsoever applied). The following statutes penalized a businessman's refusal to serve all comers: (1357), 31 Ed. III, c. 10 (victualers); (1360), 35 Ed. III (fishermen); (1433), 11 Hen. VI, c. 12 (candlers); (1464), 4 Ed. IV, c. 7 (shoemakers); *Lane* v. *Cotton*, 1 Ld. Raym. 646, 655; 1 Salk. 18, 19; 12 Mod. 472, 485 ("If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies . . .").

[41] *Miller* v. *Schoene*, 276 U. S. 272 (1928).

[42] *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946).

size of billboards,[43] and to make loaves of bread a certain size.[44] Moreover, employers have been compelled to allow labor organizational activities to be conducted on their property.[45] And only recently, property holders have been forbidden to use their property in a way which would, in the course of a program of racial discrimination, intimidate their lessees in the exercise of the franchise, *United States* v. *Beaty*, 288 F. 2d 653 (6th Cir. 1961).

Other facets of the claimed property right to discriminate on the basis of race in these circumstances are clearly separable from the core of Kress's interest in its business. In addition to the fact that no privacy has been intruded upon, the asserted property right did not seek to protect the premises from use alien to their intended function. Petitioners sought only to purchase and consume food in an area provided for such activity. The asserted right to exclude expressed only a preference for racial segregation and not any objection to petitioners' demeanor or conduct. And this was not a private choice. It expressed community custom. The capricious nature of the discriminat on was highlighted by the fact that this same store served food to Negroes and to whites accompanying them if they were standing, but not if they were seated (R. 22). As in *Shelley* v. *Kraemer*, 334 U. S. 1, 10, the restriction did not limit the type of use made of the premises, nor the type of person or conduct permitted thereon except to refer to race.

Moreover, the property interest enforced below attempted only to achieve discrimination in a store thrown open by

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[43] *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917).

[44] *Schmidinger* v. *Chicago*, 226 U. S. 578.

[45] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1955); *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1945).

the owner to the general public (including Negroes) for his own business advantage (Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 506). The specific area within the store in dispute, i.e., the lunch counter, was a public part of the premises and an integral part of a single commercial establishment serving the public. Though a sign at the counter stated "Invited Guests and Employees Only" (R. 23), in practice the category of "Invited guests" was meant to include the entire white public, except whites accompanying Negroes (R. 22-23).

Consequently, the property interest enforced below is simply a claimed right to enforce racial discrimination in very particular circumstances. It obviously is not true that refusal to enforce this asserted incident of ownership destroys the whole bundle of rights. That result would be contrary to the entire genius or our jurisprudence.

The premise that Kress owns the property does not lead to the ultimate logical extreme that it may absolutely control the conduct and associations of others in the store.

Mr. Justice Holmes has written that "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 345, 355. Only last term, Mr. Justice Frankfurter, dissenting, pointed out the indubitable truth that "An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms and it is no less true of the Equal Protection Clause of the Fourteenth." *Baker* v. *Carr*, 369 U. S. 186, 285-86. In the case at bar Kress's property is limited by the Fourteenth Amendment

and does not reach the constitutionally untenable logical extreme that the states may aid the store in upholding racism. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

**E. In Any Event the Convictions Below Must Fall When, in Addition to the Foregoing, North Carolina Has Failed to Protect Negro Citizens in the Right to Equal Access to Public Accommodations.**

Here, however, we have more than the elements set forth above—State arrest, conviction and prison term; implementation of a community custom of racial segregation generated by state law; enforcement of an odious property right of minor consequence to the owner; elaborate state initiative and involvement in establishment and maintenance of the enterprise. Here the State has failed to provide what the *Civil Rights Cases* assumed the States did provide: "a right to enjoy equal accommodation and privileges," which this Court termed "one of the essential rights of the citizen which no state can interfere with." 109 U. S. at 19.

This Court has recognized that States' failure or refusal to act can deny the equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461, 469; *Truax* v. *Corrigan*, 257 U. S. 312; see *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951); *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

Indeed, it is questionable whether the verbal concept of "state action" in equal protection cases rests on more than a misunderstanding,[46] for the phrase, no state shall deny

[46] See, generally Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U. S. 3, 26-62.

equal protection refers even more naturally to state inaction than to state action.

Mr. Justice Woods, a member of the majority in the *Civil Rights Cases*, stated in *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282 1871):

> Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

His concurrence with the majority in the *Civil Rights Cases* may, therefore, be explained by his agreement with their assumption that remedies against the discrimination in those cases existed under state law.

This indeed was a view held by some of the legislators concerned with the scope of the Amendment at or around the time of its passage. For example, Representative Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.
2. *That a failure to enact the proper laws for that purpose, or a failure to enforce them,* is a denial of equal protection. (Emphasis added.)
3. That when there is such a denial Congress may enact laws to secure equal protection.[47]

[47] Cong. Globe, 42nd Congress, 1st Sess. 483 (1871).

Representative Lawrence in debates on the Civil Rights Act of 1875 stated:

> What the State permits by its sanction, having the power to prohibit, it does in effect itself.[48]

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission*, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.[49] (Emphasis added.)

This view is endorsed by the opinion in the *Civil Rights Cases*, for that decision was based on the assumption that the states in question would provide remedies securing to their citizens the right of access to places of public accommodation without racial discrimination:

> We have discussed the question presented by the law on the assumption *that a right to enjoy equal accommodations* and privileges in all inns, public conveyances, and places of public amusement, *is one of*

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[48] Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

[49] Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).
Other contemporary congressmen also suggested that state inaction may be as culpable as action: In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

*the essential rights of the citizen which no state can abridge or interfere with* (109 U. S. at 19). (Emphasis added.)

* * * * *

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears?* (109 U. S. at 24). (Emphasis added.)

Mr. Justice Bradley's entire opinion was concerned with the question whether the Fourteenth Amendment had conferred on Congress the power to regulate the acts of private individuals when, as he presumed, the States were exercising their responsibilities toward the goal of eliminating racial discrimination. While he concluded in the negative, it is extremely doubtful that the result would have been the same if a state had been found to be in effect sanctioning private discrimination by laxity in this regard. See Konvitz & Leskes, A Century of Civil Rights 150 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Q. 375, 376; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 184 (1935); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 21 (1959).

This case, therefore, is like *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725:

[T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Four-

> teenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For here in an area in which the State is deeply involved it has both positively and negatively sanctioned the racial segregation which gave rise to this case.

## II.

**The Criminal Statute Applied to Convict Petitioners Gave No Fair and Effective Warning That Their Actions Were Prohibited: Petitioners' Conduct Violated No Standard Required by the Plain Language of the Law; Thereby Their Conviction Offends the Due Process Clause of the Fourteenth Amendment and Conflicts With Principles Announced by This Court.**

Petitioners were convicted under North Carolina General Statute, §14-134, which provides:

> If any person after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days.

Although the statute in terms prohibits only going on the land of another *after* being forbidden to do so, the Supreme Court of North Carolina has now construed the statute to

prohibit also remaining on property when directed to leave following lawful entry (R. 82). Stated another way, the statute now is applied as if "remain" were substituted for "enter." Expansive judicial interpretation of the statute began by a statement in *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958) (a case in which defendants deliberately ignored racial signs posted outside an ice cream parlor and also refused to leave upon demand),[50] 92 years after enactment of the law.[51]

The instant case is the first unambiguous holding under §14-134 which convicts defendants who went upon property with permission and merely refused to leave when directed.

Without a doubt petitioners and all Negroes were welcome within the store—apart from the basement lunch counter. The arresting officer stated that, "The only crime committed in my presence, as I saw it, was their failure and refusal to leave when they were ordered to do so by the manager" (R. 26). There were no discriminatory signs outside the store (R. 23). No sign forbade Negroes and white persons who accompany Negroes to sit at the lunch counter; the sign said merely "Invited Guests and Employees Only" (R. 23). Whatever petitioners' knowledge of the store's racial policy as it had been practiced, there was no suggestion that they

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[50] In the *Clyburn* opinion, and here, the State Court explained construction of §14-134 by reference to analogous construction of a statute prohibiting forcible entry and detainer (N. C. Gen. Stat. §14-126), which had been construed to apply to peaceful entry followed by forcible opposition to a later demand to leave. The court held that "entry" was synonymous with "trespass" in both statutes (§14-126 and §14-234). (§14-134 does not use the word "entry"; it states "go or enter upon.")

The facts of the *Clyburn* case are summarized in the opinion below in this case (R. 79).

[51] The Statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, C. 60.

had ever been forbidden to go to the lunch counter and request service. The Court's conclusory statement that defendants "entered" (trespassed) "after having been forbidden to do so" (R. 88), was simply a holding that defendants' acts in failing to leave when directed violated the statute.

Absent the special expansive interpretation given §14-134 by the North Carolina Supreme Court, the case would plainly fall within the principle of *Thompson* v. *City of Louisville*, 362 U. S. 199, and would be a denial of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after having been forbidden to do so," and the conclusion that they did rests solely upon the special construction of the law.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently express to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

The basic function of the proscription against "vagueness" is to ensure that a defendant at the time of his acts is sufficiently apprised by the state law that these acts are forbidden. The whole thrust of the doctrine, therefore, concerns a right to fair warning at a time prior to the state court's interpretation of the statute under which the prosecution was had. There must, therefore, be some limits set to the range permitted to construction if the right to fair warning is not to be seriously curtailed. Judicial construction often has been permitted to cure criminal statutes of the vice of vagueness, but these have been constructions which confine, not expand, statutory language. Cf. *Chaplinsky* v.

*New Hampshire*, 315 U. S. 568, with *Herndon* v. *Lowry*, 301 U. S. 242. The more the construction expands a statute and varies from what is reasonably predictable by the plain words, the more it should be open to a charge of vagueness in the application. In its present posture, the trespass statute has been so judicially expanded that it could not have given fair and effective warning of the acts it now prohibits. Rather by expansive interpretation the statute now reaches more than its words fairly and effectively define. This Court, by adjudging the construction vague in the application does not usurp the function of the state court as the ultimate arbiter of the meaning of state statutes. It merely prevents an *ad hoc* statement of the posture of state law from acting to deprive the defendants of fair notice required by the due process clause of the Fourteenth Amendment. This Court has in the past exercised such residual control over construction of state law which unreasonably threatened defendants with a loss of their constitutional rights. *N. A. A. C. P.* v. *Alabama, ex rel. Patterson*, 357 U. S. 449; *Staub* v. *Baxley*, 355 U. S. 313.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 306, 311:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451, and cases cited.

In *Pierce, supra*, the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the T. V. A. Similarly, in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a

criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry or inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177:

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry*, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases runs a uniform application of the rule expressed by Chief Justice Marshall:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated (Id. 18 U. S. (5 Wheat.) at 96).

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction closely akin to the constitutionally required rule of fair and

effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey, supra,* and "cases cited therein," while *Cardiff* mentions *United States* v. *L. Cohen Grocery Co., supra,* and *Herndon* v. *Lowry, supra.*

On its face the North Carolina trespass statute warns against a single act, i.e., going or entering upon the land of another "after" being forbidden to do so. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

But by judicial interpretation "enter" was held synonymous with "trespass," and, in effect, also with "remain." Here a legislative *casus omissus* was corrected by the court. But as Mr. Justice Brandeis observed in *United States* v. *Weitzel, supra* at 543, a *casus omissus* while not unusual, and often undiscovered until much time has elapsed, does not justify extension of criminal laws by reference to legislative intent.

Moreover, that the indictments specified both that petitioners had entered after having been forbidden and also that they refused to leave after being ordered to do so, does not correct the unfairness inherent in the statute's failure specifically to define a refusal to leave as an offense. As this Court said in *Lanzetta* v. *New Jersey, supra*:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg* v. *California,* 283 U. S. 359, 368; *Lovell* v. *Griffin,* 303 U. S. 444.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have specifically recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[52]

Converting by judicial construction the common English word "enter" into a word of art meaning "trespass" or "remain," has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common word will understand, of what the law intends to do if a certain line is passed" (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common-law usage of the word "enter" support the proposition that it is synonymous with "trespass" or "remaining." While "enter" in the sense of going on and taking possession of land is familiar (Ballantine, "Law Dictionary" 436 (2d Ed. 1948), "Black's Law Dictionary" (4th Ed. 1951), 625), its use to mean "remaining on land and refusing to leave it when ordered off" is novel.

It must be noted, too, that petitioners' request for service was part of a protest against racial discrimination and as

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[52] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wording of the statutes varies but all of them effectively distinguish between the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71-1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code §2411; Nevada Code, §207.200; Ohio Code, §2909.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

such an exercise of free speech. This Court has in many instances held a statute more amenable to an attack of vagueness where its construction creates a danger of encroachment on the right of free speech and threatens to deter its legitimate exercise. *Saia* v. *New York*, 334 U. S. 558; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Kunz* v. *New York*, 340 U. S. 290. To avoid an undue restriction on free speech, where it is an incident of conduct, the statute must clearly define the prohibited activity; consequently, the scope of construction must have less latitude. An interpretation completely unpredictable by the plain language of the statute, which is used to bring petitioners' protest within the ambit of prohibited conduct cannot but have such an "inhibiting effect on speech." *Smith* v. *California*, 361 U. S. 147, 151.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws and embodied in the due process clause of the Fourteenth Amendment.

## III.

**The Decision Below Conflicts With Decisions of This Court Securing the Fourteenth Amendment Right to Freedom of Expression.**

Petitioners were engaged in the exercise of free expression by means of verbal requests to the management and the requests implicit in seating themselves at the counter for nonsegregated lunch counter service. Their expression (asking for service) was entirely appropriate to the time and place in which it occurred. Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as no disorder or obstruction of business occurs.

Petitioners did not shout, obstruct business, carry picketing signs, give out handbills, or engage in any conduct inappropriate to the time, place and circumstances. And, as is fully elaborated above, *supra*, pp. 15-16, there was no invasion of privacy involved in this case, since the lunch counter was an integral part of commercial property open up to the public.

This Court and other courts on numerous occasions have held that the right of free speech is not circumscribed by the mere fact that it occurs on private property. The existence of a property interest is but one circumstance to be considered among many. In *Marsh* v. *Alabama*, *supra*, for example, this Court overturned the trespass conviction of Jehovah's Witnesses who went upon the premises of a company town to proselytize holding that such arrest and conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *National Labor Relations Board*,

324 U. S. 793, the Court upheld the validity of the National Labor Relations Board's ruling that lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices.[53]

In *Martin* v. *Struthers*, 319 U. S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residences for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", *Breard* v. *Alexandria*, 341 U. S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation of magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U. S. 644, might convict for crime in the nature of trespass after balancing the "conveniences be-

[53] See also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir., 1945); *United Steelworkers* v. *N. L. R. B.*, 243 F. 2d 593, 598 (D. C. Cir., 1956) (reversed on other grounds) 357 U. S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252 (employees seized plant; discharge held valid: "high-handed proceeding without shadow of legal right").

tween some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U. S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

Similarly, following an appraisal of the speech and property considerations involved, a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center. See also *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948), which held that picketing within Pennsylvania Station was not trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it"; *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959), which denied relief to a shopping center owner against picketers on his property, relying on the Fourteenth Amendment.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is not limited to verbal utterances, though petitioners here expressed themselves by speech. The right comprehends picketing; *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, 319 U. S. 141; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

In the circumstances of this case, the only apparent state interest being preserved was that of maintaining the management's right to exclude Negroes from the lunch counter. The management itself sought nothing more. But as Justice Holmes held in *Schenck* v. *United States*, 249 U. S. 47, 52, the question is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil" that the state has a right to prevent.

The state has no interest in preserving such discrimination and certainly has no valid interest in suppressing speech which is entirely appropriate to the time and place and does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.**

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1962

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No. 11

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JOHN THOMAS AVENT, et al.,
Petitioners,

vs.

STATE OF NORTH CAROLINA

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

---

## BRIEF OF THE STATE OF NORTH CAROLINA

---

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# Supreme Court of the United States

October Term, 1962

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No. 11

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JOHN THOMAS AVENT, et al.,

Petitioners,

vs.

STATE OF NORTH CAROLINA

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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# BRIEF OF THE STATE OF NORTH CAROLINA

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## OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported as STATE v. AVENT, STREETER, COLEMAN, BROWN, PHILLIPS and NELSON, 253 N. C. 580, 118 S. E. 2d 47. The opinion of the Supreme Court of North Carolina was filed on January 20, 1961. The opinion also appears in the transcript of record, hereafter referred to as "R", on p. 73. Judgment of the Superior Court of Durham County, in which the petitioners were originally convicted, appears on R. 15 and is not otherwise officially reported but is recorded in the minutes of the Clerk of the Superior Court of Durham County.

## JURISDICTION

The petitioners obtained an extension of time in which

to file petition for certiorari and filed their petition on May 4, 1961, within the time allowed, and on June 25, 1962, this Court granted a writ of certiorari, as appears on R. 92. The petitioners invoked the jurisdiction of this Court upon an allegation that they have been denied rights guaranteed by the Fourteenth Amendment and as provided by 28 USCA 1257(3).

North Carolina denies that there is any substantial federal question presented and further denies that petitioners were deprived of any rights, privileges or immunities secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) The petitioners invoke a portion of the Fourteenth Amendment of the Constitution of the United States as quoted below:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) The petitioners were convicted under Sec. 14-134 of the General Statutes of North Carolina, which is as follows:

> "Sec. 14-134. *Trespass on land after being forbidden.*— If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days."

## QUESTIONS PRESENTED

The State of North Carolina submits the following as the questions presented in this case:

(1) Does Section 1 of the Fourteenth Amendment prohibit the operator of a private enterprise from selecting the patrons, customers or clientele he will serve, and does it prohibit such operator of a private enterprise from making such selection based on color if he so desires?

(2) Do the provisions of Section 1 of the Fourteenth Amendment prohibit the Courts of North Carolina from applying the State's general trespass statute to the petitioners, who are both colored and white, upon the request of a proprietor or private owner of a restaurant or luncheonette?

(3) Is the operation of a mercantile establishment, which has a luncheonette department, a business affected with the public interest so that the owner and operator must serve without discrimination all who seek service?

(4) Is Section 14-134 of the General Statutes of North Carolina void in that it is vague and indefinite, and, therefore, does not set forth an ascertainable standard of conduct?

(5) Under the circumstances of this case were the petitioners denied freedom of speech in violation of Section 1 of the Fourteenth Amendment?

## PROCEEDINGS IN THE NORTH CAROLINA COURTS

Petitioners were indicted in the Superior Court of Durham County on separate bills of indictment (R. 1) for a violation of the general criminal trespass statute (Sec. 14-134, General Statutes of North Carolina). Briefly, it is charged that petitioners unlawfully entered upon and refused to leave the premises of S. H. Kress & Company after being ordered to do so by the agent and manager. The indictments were all consolidated for trial (R. 15) and on July 1, 1960, the jury returned a verdict of guilty as to each petitioner. The trial judge pronounced judgment (R. 16) in the various cases, and the petitioners appealed to the Supreme Court of North Carolina.

After briefs had been filed and oral arguments the Supreme Court of North Carolina filed its opinion on January 20, 1961, in which it affirmed the judgments of the lower court (STATE v. AVENT, STREETER, COLEMAN, BROWN, PHILLIPS and NELSON, 253 N. C. 580, 118 S. E. 2d 47). North Carolina does not allow petitions to rehear in criminal cases. The petitioners filed application for certiorari on May 4, 1961, and this Court granted Certiorari on June 25, 1962.

## NORTH CAROLINA'S STATEMENT OF THE CASE

The State of North Carolina contends that the evidence in these cases supports a statement of facts, as follows:

1. Five of the petitioners (Streeter, Phillips, Callis Napolis Brown, Shirley Mae Brown and Avent) are persons of the colored race, and two of the petitioners (Joan Harris Nelson and Frank McGill Coleman) are persons of the white race.

(2) Joan Harris Nelson (Trumpower) gave a Washington address of a Negro friend at Howard University. She is a member of the white race and her husband is part white and part Indian (R. 42, 43). On May 6, 1960, she was a student at Duke University and at the time of the trial she was living in Alexandria, Virginia.

(3) Frank McGill Coleman is a member of the white race. He was born in Vicksburg, Mississippi, now lives in Pittsburgh, and at the time of trial was a student at Duke University (R. 45, 46).

(4) The remaining petitioners are colored persons, live in the State of North Carolina, and at the time of trial were attending North Carolina College at Durham. (R. 36, 39, 43, 47, 48).

(5) The petitioners had previously been engaged in picketing the Durham Store of S. H. Kress & Company and in urging a boycott of the store unless their demands for luncheon service were met (R. 21, 36, 41, 43, 46, 48, 49).

(6) It is clear from the evidence that all these demonstrations and sit-ins were the result of concerted action and previous agreements (see evidence of Callis Napolis Brown R. 44, 45). The organization had counsel and had consulted counsel about these matters (R. 37). It would seem also that the matter of furnishing bond had already been considered and was left to the attorneys (R. 38). This demonstration took place on May 6, 1960, but attorneys had been consulted as early as February, 1960, (R. 38). It is also clear from the evidence that a meeting had been held on the night before May 6, 1960, strategy had been planned, and it was agreed to make a purchase in some other part of the store before going to the lunch counter (R. 37, 40, 44, 45, 48, 49). The object, therefore, was to create a test case in the Courts.

(7) S. H. Kress & Company operates a store on West Main Street in the City of Durham (R. 20). The Company has two selling floors and three stockroom floors (R. 21). On the first floor the Company provides a stand-up counter where food is served and at this counter both white and colored people are served whether they accompany each other or not (R. 22, 40). There is a luncheonette department at the rear of the basement floor (R. 21). This department had signs posted saying that the luncheonette was open for the purpose of serving invited guests and employees only. There were iron railings separating this department from the other departments, and on the date in question there were chained entrances (R. 21). Mr. W. K. Boger, Manager of the store in Durham had been with the Company for 30 years (R. 24). He gave evidence that there were two reasons for not serving colored people in the luncheonette: (a) The store management followed the customs of the community, and (b) that it was also in the interest of public safety (R. 22).

(8) While some portions of the evidence are conflicting, the State of North Carolina contends that the evidence supports the version of events hereinatfer stated. The petitioners, and others as they previously planned, went to the first floor and made purchases, keeping their receipts and the

articles which were later offered in evidence (R. 35, 37, 39, 40, 43, 45, 46, 47, 48, 49). There were some 35 to 40 persons involved in this demonstration but they did not all go to the luncheonette at the same time (R. 37, 49). The Manager (W. K. Boger) testified that he asked these petitioners not to be seated and told them that the luncheonette department was open only to employees and invited guests. After the petitioners seated themselves the Manager asked them to leave and they refused to leave until they were served. The Manager called an officer of the Police Department and this officer asked them to leave and they would not. The officer then arrested petitioners on a charge of trespass (R 21). The evidence of the police officer is to the same effect except in his narrative he says that when he arrived he found Brown seated at the lunch counter, arrested him and started back to the station but before he got to the street someone shouted: "You had better go back." He went back downstairs and there were 30 or 40 seated; after they were told to leave (these petitioners) he made the arrests (R. 26). The other officer testified (R. 25) that he asked the petitioners to leave and that he heard Mr. Boger ask them to leave (R. 25).

## ARGUMENT

### I

### THE GENERAL TRESPASS STATUTE OF NORTH CAROLINA

Along with many states North Carolina has a general trespass statute which has been a part of the State's code for almost a century. This statute was first enacted in 1866 (Chap. 60, Public Laws of 1866) and now appears as Section 14-134 of the General Statutes of North Carolina. In 1943 this Court made reference to the fact that general trespass statutes existed in at least 30 states, and that similar laws of narrower scope were on the books of at least 12 states. (MARTIN v. STRUTHERS, 319 U. S. 141, 63 S. Ct. 862, 87 L. ed. 1313). Closely related is another statute on forcible entry and detainer, which reads:

> "Sec. 14-126. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

The above statute is in substantially the language of the English statute (5 Ric. II, c. 8) and came to this State from England, and it is believed that the concept in the general trespass statute is expressed in the Common Law. These statutes, therefore, existed long before colored people even dreamed of taking possession of a luncheonette by means of a sit-in demonstration.

In explaining these statutes the Supreme Court of North Carolina said (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295):

> "Our statutes, G. S. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense."

The Supreme Court of North Carolina as early as 1885 described a trespasser; and has done so in many cases before these petitioners were convicted (STATE v. COOKE, 246 N. C. 518, 98 S. E. 2d 885; STATE v. GOODSON, 235 N. C. 177, 69 S. E. 2d 242; ARMSTRONG v. ARMSTRONG, 230 N. C. 201, 52 S. E. 2d 326; LEE v. STEWART, 218 N. C. 287, 10 S. E. 2d 804; BRAME v. CLARK, 148 N. C. 364, 62 S. E. 418; STATE v. WILSON, 94 N. C. 840). The Supreme Court of North Carolina also explained the use of the word "enter" which appears in the statute (State v. Clyburn, Supra):

"What is the meaning of the word 'enter' as used in the statute defining criminal trespass? The word is used in G. S. 14-126 as well as G. S. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G. S. 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. S. v. GOODSON, supra; S. v. FLEMING, 194 N. C. 42, 138 S. E. 342; S. v. ROBBINS, 123 N. C. 730; S. v. WEBSTER, 121 N. C. 586; S. v. GRAY, 109 N. C. 790; S. v. TALBOT, 97 N. C. 494. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass'. It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent."

The essential rights and duties under the trespass statute (G. S. 14-134) are explained in STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424: Entry upon the land of another under a *bona fide* claim of right is not a criminal offense (STATE v. CROSSET, 81 N. C. 579), but a mere belief of a claim of right is not sufficient for there must be proof of title or evidence of a reasonable belief of the existence of the right of entry (STATE v. FISHER, 109 N. C. 817, 13 S. E. 878; STATE v. DURHAM, 120 N. C. 546, 28 S. E. 22). A *bona fide* claim of right must be passed upon by a jury (STATE v. WELLS, 142 N. C. 590, 55 S. E. 210) but a claim of right is not a mere abstraction since there must be evidence of such a claim or facts giving rise to a reasonable and *bona fide* claim (STATE v. FAGGART, 170 N. C. 737, 87 S. E. 31).

An assertion by counsel for the plaintiffs to the effect that these trespass statutes have been administered solely or for the most part against colored persons is utterly untrue, and a survey of the decisions of the Supreme Court of North Carolina will support our view! In fact, it is interesting to note that in 1899 six white men entered in and upon a small tract of land containing 20 acres that was owned by an old colored woman and over her protest cut and carried off the timber on her land. The white men were convicted for this conduct for violating the statute on forcible trespass, and this con-

viction was sustained by the Supreme Court of North Carolina (STATE v. ELKS, 125 N. C. 603, 34 S. E. 109).

The owner of property under the laws of North Carolina has a right to use sufficient force to remove a trespasser from his premises. In 1903, in the case of STATE v. CROOK, 133 N. C. 672, 45 S. E. 564, the Supreme Court of North Carolina corrected the lower court on an instruction on this point, and said:

> "We think the true rule which should have controlled the conduct of Frank upon the evidence on the point was that he had a right in the first place to direct Jeff to leave his premises; that in case of refusal he might have laid his hands on him gently, for the purpose of removing him from his premises; and if that course did not bring about the desired result, then he might have used sufficient force under all the circumstances to put him off. The law would not authorize one to use excessive force in removing a trespasser from one's premises, but the jury should not weigh in golden scales the amount of force used for such purpose."

The law of trespass as interpreted by the North Carolina Supreme Court has said that even though a person has a right to pass along the way, and that the entry, if peaceable, is not even a civil trespass, yet, as soon as such person or persons violate the possession of the owner, create disturbance or commit violence, they become trespassers *ab initio* (STATE v. BUCKNER, 61 N. C. 558).

The Court will find the subject of trespass discussed in 37 North Carolina Law Review 71, and the Court will find the history of trespass statutes in North Carolina in 39 N. C. Law Review 121, as well as STATE v. DAVENPORT, 156 N. C. 596, 72 S. E. 7. We have discussed the trespass laws to some extent, and we have shown from the cases that they have been applied in favor of the colored people, against colored people, and an examination of the cases will show that they have been applied in favor of white people and against white people.

II

## CONSTITUTIONAL AND STATUTORY SEGREGATION IN NORTH CAROLINA

In order to create prejudice against the State of North Carolina before this Court, counsel for petitioners has referred to certain segregation laws, some of which are on the statute books of the State. We think that some answer should be made to these charges.

First of all, it is stated that the various bills of indictment (R. 1) are marked "CM" or "CF", which designate the defendant in the bill as colored male or colored female. It will also be seen, for example (R. 5), that the white persons indicted are designated as "WM" or "WF", which represents white male or white female. This is standard practice on bills of indictment for the reason that the State keeps criminal statistics, and it has a right to make studies to see whether or not certain patterns of crime develop along racial lines. There are certain tribes of Indians in the State and people of other racial descent, and we see no constitutional reason why we should not keep such records. We are informed that certain colored organizations tried to prohibit all racial designations in the Bureau of Census in the Department of Commerce but that the Census Bureau continues to compile statistics and make enumerations of population on a racial basis. After all, some power created colored people, and this is a fact which would still exist even though there was a judicial decree to the contrary.

It is true that G. S. 127-6, as to the North Carolina National Guard, provides for white troops and colored troops but to date scarcely any colored persons have made any application for enlistment in the National Guard.

It is said that the statutes as to segregation in our schools have been repealed but that school segregation continues to be enforced by other means. The charge that without a single exception school boards have made initial assignments of

white pupils to previously white schools and Negro children to previously Negro schools is not true. The Charlotte School Board of its own motion assigned some 40 to 50 Negro children to white schools, and some assignments have been made in Raleigh and Winston-Salem by the school boards upon their own motions. We have tried to change a way of life which previously existed without arousing any more resentment than possible. While North Carolina was asked to file a brief *amicus curiae* in the second *Brown Case*, neither the State nor its units of government have yet been brought before this Court on public school matters.

As to mental institutions, orphanages, schools for the blind and deaf and training schools, the State recognizes that where State action is concerned there can be no discrimination in the use of facilities. Recently a suit was brought in the Federal District Court to compel the admission of a colored child into Murdoch School for Mentally Deficient Children. The State answered and admitted the right of the child to be admitted to the State Institution but alleged that the child would have to take its turn on the waiting list, and the parents of the child had been given this information prior to the suit.

We do keep separate tax books for white, Negro, Indian and corporate taxpayers as we have found that this greatly facilitates the collection of delinquent taxes. We are not aware that it is a violation of the Constitution to show the true race of a person on official records. For that matter our Bureau of Vital Statistics keeps its birth certificates on a racial basis as to all races. There are racial distinctions in cemeteries to which situation as far as we know no person has raised any question. There are separate funeral homes but petitioners do not actually point to any statute which prohibits a white person from using the services of a Negro funeral home or the reverse. Petitioners to support this assertion cite G. S. 90-212, which deals with the distribution of bodies to the various funeral homes where prisoners die and their bodies are not claimed by relatives.

The Charlotte ordinance which sets the area within which Negro police have authority has no doubt been found to be the best way of utilizing such police services. We commend counsel for petitioners for saying that we do not require segregation in State Parks.

Referring to the statutes as to transportation, waiting rooms, city buses, and, in fact, in all matters connected with transportation, segregation has been abolished for some time. Both races use city buses without any seating arrangements. Both races use the same waiting room in bus stations, although the former colored waiting room in some stations is still left open for those colored people who still have some pride of race and wish to be with each other. As a matter of fact, colored people have their choice of waiting rooms; there is no segregation in either intrastate or interstate transportation.

There are separate rest rooms for the races in the operation of private business, and it is true that in the inspection of cafes and restaurants the grade forms do contain criteria as to the adequacy of rest rooms for each sex and race. We find that we have more peace and get along better on this basis.

There is still a statute on the books (G. S. 58-267) which prohibits fraternal orders from doing business in the State if white and colored persons are members of the same lodge.

The Constitution and statutes of North Carolina do still prohibit intermarriage of white persons to Negroes to the third generation inclusive. Just as Mr. Justice Holmes thought that three generations of mentally deficient people were enough we still think that a hybrid race will not improve either race.

We are not familiar with all of the city ordinances that remain on the books as a carry-over from the days of absolute segregation. We are a Southern State, and we lived formerly in that manner; these vestiges will not disappear all at once. It is thought that there are even some segregation practices in northern states.

Wherever there has been State action or an exertion of power by governmental units and this has been brought before the Supreme Court of North Carolina that Court has always recognized the Constitution of the United States as the supreme law of the land. In CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163, the Supreme Court of North Carolina said:

> "Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown case* is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid."

We are all, of course, a product of the environment or milieu into which we are born, along with the type of culture, customs and entrenched patterns of behavior that prevail at the time. To charge us with following a custom of segregation is indeed emphasizing the obvious and represents an attempt to convert the well-known facts into a great discovery. One is reminded of the statements of George Bernard Shaw in regard to certain biologists who set out to prove certain facts well-known to mankind. He said that such scientists were "solemnly offering us as epoch-making discoveries their demonstrations that dogs get weaker and die if you give them no food; that intense pain makes mice sweat; and that if you cut off a dog's leg the three-legged dog will have a four-legged puppy." (Preface to *Back to Methuselah*)

It is believed that counsel for the petitioners partake of the

environment and customs into which they are born and that they, as well as ourselves, have their customs, culture and mores spoon-fed and given to them by a process of indoctrination. It is submitted, therefore, that before we are condemned and now held up to scorn because we thought we could choose our associates it should be remembered, and, in fact, it should not be forgotten at all, that prior to 1954 we had judicial sanction and approval for our customs and practices on the part of both Federal and State Courts.

III.

## THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE OPERATOR OF A PRIVATE ENTERPRISE FROM SELECTING THE PATRONS, CUSTOMERS OR CLIENTELE HE WILL SERVE NOR DOES IT PROHIBIT HIM FROM MAKING SUCH SELECTION ON THE BASIS OF COLOR IF HE SO DESIRES.

Under this subject we desire to discuss the first two questions which we have given as the Questions Presented in our brief.

Putting to one side the ancient and long accepted rules as to innkeepers, cab transportation and grist mills, we submit that the Supreme Court of North Carolina is clearly supported by the great weight of authority when it said (State v. Avent, et al., Supra):

> "No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant, privately operated in a privately owned building has a right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa,

if he so desires. He is not an innkeeper. This is the common law."

To support this proposition there are several cases (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295; WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, 4 Cir., 268 F. 2d 845; SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., 181 F. Supp. 124, aff'd. per curiam 4 Cir., 284 F. 2d 746; GRIFFIN v. COLLINS, 187 F. Supp. 149; DREWS v. MARYLAND, 224 Md. 186, 167 A. 2d 341; RANDOLPH v. COMMONWEALTH, 202 Va. 661, 119 S. E. 2d 817; GRIFFIN v. MARYLAND, 225 Md. 442, 171 A. 2d 717; ALPAUGH v. WOLVERTON, 184 Va. 943, 36 S. E. 2d 906; NANCE v. MAYFLOWER RESTAURANT, 106 Utah 517, 150 P. 2d 773; HENDERSON v. TRAILWAY BUS CO., 194 F. Supp. 423; ARMWOOD v. FRANCIS, 9 Utah 2d 147, 340 P. 2d 88; POWELL v. UTZ, 87 F. Supp. 811; BROWDER v. GAYLE, 142 F. Supp. 707, aff'd 352 U. S. 903, 1 L. ed. 2d 114, 77 S. Ct. 145).

In WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, supra, Judge Soper, writing for the Fourth Circuit Court of Appeals, on this subject said:

> "The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the states from making or enforcing any *law* abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

"This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulson by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. ed. 1161:

> "'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'"

In SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., 181 F. Supp. 124, the plaintiff took the position that the decisional law of the State of Maryland sanctioned the custom, practice and usage of segregating the races in restaurants. In answering this contention the Court said:

> "Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers."

In HENDERSON v. TRAILWAY BUS CO., 194 F. Supp.

423, Judge Albert V. Bryan, whose record shows him to be an objective judge, said:

> "But, in any event, the critical factor is that the statutes apply only to places where a person goes 'without authority of law', meaning property not at the time affected with the public interest. Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use. * * * After accrediting all of the plaintiffs' testimony with its face value, still no proof appears of discrimination against Negroes in the invocation of the statutes. There are no instances adduced of differentiation between the races in the execution of these laws. Indeed, the evidence reveals that both whites and Negroes were arrested for the transgressions, as well as persons identified as 'Moorish Americans', who are described as being neither white nor Negro."

The right of the owner of a private enterprise, whether the same be a restaurant or other form of private business enterprise, to make such selection of customers or patrons as he desires has been repeatedly upheld by the appellate courts of the various states (MADDEN v. QUEENS COUNTY JOCKEY CLUB, 269 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; TERRELL WELLS SWIMMING POOL v. RODRIGUEZ TEX. CIV. APP., 182 S. E. 2d 824; BOOKER v. GRAND RAPIDS MEDICAL COLLEGE, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S., 447; YOUNGER v. JUDAH, 111 Mo. 303, 19 S. W. 1109; GOFF v. SAVAGE, 122 Wash. 194, 210 P. 374; DE LA YSLA v. PUBLIX THEATRES CORPORATION, 82 Utah 598, 26 P. 2d 818; BROWN v. MEYER SANITARY MILK CO., 150 Kan. 931, 96 P. 2d 651; HORN v. ILLINOIS CENT. R. CO., 327 Ill. App. 498, 64 N. E. 2d 574; COLEMAN v. MIDDLESTAFF, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; FLETCHER v. CONEY ISLAND, 100 Ohio App. 259, 136 N. E. 2d 344; ALPAUGH v. WOLVERTON, 184 Va. 943, 36 S. E. 2d 906.).

This rule was recognized by Mr. Justice Holmes in TER-

MINAL TAXICAB CO. v. KUTZ, 241 U. S. 252, 256; 60 L. ed. 984, 36 S. Ct. 583, where he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing on the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *."

A

*The Argument of Custom and Usage*

The question the Court is actually facing in this argument from custom and usage is whether or not by some metaphysical or transcendental process custom and usage is transformed or converted into state action. Petitioners apparently argue that this is enough but if it should not be enough, then the addition of property affected with public interest, enforcement by court action and licensing requirements would surely be enough to constitute state action as they allege. Of course, the statute giving an action for deprivation of rights (42 USC 1983) uses the words "custom, or usage", but this must be construed in connection with the deprivation of definite rights or privileges of a constitutional nature that are fixed and established. For example, the same is true in regard to the holding in SHELLEY v. KRAEMER, 334 U. S. 1, 92 L. ed. 1161, 68 S. Ct. 836, for the Federal statute (42 USC 1982) guaranteed all persons the same right as is enjoyed by white citizens "to inherit, purchase, lease, sell, hold, and convey real and personal property." If it is true, therefore, that the private action of private owners and operators of restaurants and other private enterprises in choosing to serve patrons of any one race or in choosing to serve persons of any particular national or racial descent becomes state action, then there is no area in the choice of companions according to personal selection, racial or affinities of blood or any other preferences, irrational or illogical though they may

be, which will be free from constitutional interference in the name of and under the guise of state action.

The limits of the logic used by the petitioners would certainly be that the Fourteenth Amendment eventually requires every citizen to select his personal friends and associates according to a racial or ethnic cross section which would be made up of persons having different and varied ancestries. If the members of a certain racial group wish to patronize a certain restaurant to the exclusion of certain other groups and the owner of the restaurant agrees, then this would violate the Constitution according to this theory. If the theory of the petitioners is the correct interpretation of the Fourteenth Amendment, then no private club, such as a country club, can set up rules of eligibility which would exclude colored people for that very act, as well as the act of one who argued in such a club for the exclusion of colored people, would be state action. Sometimes white families in the Southern States who own large residences will rent rooms that are not needed, and if they excluded Negroes in their renting procedures they would violate the Constitution. Occasionally such families will furnish meals, and if they customarily refuse to serve Negroes while serving white people, then under this theory they will be liable for damages under 42 USC 1983 or could be imprisoned under 18 USC 242. Under this theory the Mormon Church would be discriminating against colored people by state action, because, we are told, they exclude colored people from their membership, and, likewise, the regular Masonic lodges organized and operated by white persons would also be guilty, because, we are told, they also exclude colored people.

The protection which the Fourteenth Amendment extends even to white people as a guarantee of some freedom of choice and individualism is recognized even by those persons who strongly approve of the decision in the Brown Case and who are the foes of segregation in all areas where the state has the least influence. For example: Professor Edmond Cahn, Professor of Law at New York University School of Law, in his article on Jurisprudence (30 New York Univer-

sity Law Review 150, 156), has this to say:

> "But there are limits—even to the just claims of a political democracy. It would be ridiculous to contend that every citizen ought to select his or her social companions from a proportionate cross-section of the ethnic groups that make up the American people. If there is any area in which personal tastes, affinities, and irrational preferences may healthfully govern our behavior, it is in the process of selecting our social companions. When we resolve to observe the principles of the Constitution in every activity that is sponsored or controlled by government, our ability to do so in a willing and congenial manner may well depend on our being free, spontaneous, and unhampered in the remainder of our relationships. Somehow, sometime people will consort with whom they choose. For this reason, the distinction between official and unofficial segregation—a distinction to which the Supreme Court has adhered consistently—seems indispensable to furthering harmony among diverse racial groups. Discrimination in regard to corporate advantages (such as transportation, housing, employment, political franchise, or educational opportunity) violates the American promise; but discrimination in the choice of friends and private associates may furnish the very safety valve that many Americans require for psychic health. Friendship draws its sustenance from a fund of common experiences and inclinations; and in the majority of cases, group culture and affiliation will continue to be a primary factor."

Professor Cahn in the same article (p. 167) is also distrustful of the behavioral sciences. On this point he says:

> "In the first place, since the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today's sanguine asservation may be canceled by tomorrow's new revelation—or new technical fad. It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. Today the social psychologists—at

least the leaders of the discipline—are liberal and egalitarian in basic approach. Suppose the generation hence, some of their successors, were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racists' notions and label them 'science'. What then would be the state of our constitutional rights?"

B

*Invoking the Aid of the Court in Private Discrimination*

If the petitioners have a constitutional right to go in and upon restaurant property whenever they choose, then certainly the invoking of the aid of the Court would be state action. We certainly recognize that the term "state action" includes action through a state legislature, through state courts or through executive or administrative officers (CARTER v. TEXAS, 177 U. S. 442, 44 L. ed. 839, 20 S. Ct. 687). State action certainly includes state inaction where there is a duty to act (LYNCH v. UNITED STATES, 5 Cir., 189 F. 2d 902). It is not denied that the action of a police officer, if he acts contrary to law, is state action (VALLE v. STENGEL, 3 Cir., 176 F. 2d 697). We believe, however, a police officer can engage in state action rightfully and that color is not an exemption from the application of constitutional laws.

We will discuss the question of whether or not the general trespass statute of North Carolina under which the petitioners were indicted is void by reason of vagueness.

At the beginning of the discussion on this point it should be squarely stated that if the petitioners had a constitutionally protected right to go in and upon the property and premises of the owner of the restaurant in this case, then there is no question as to the effect of the state action of the police officer, as well as the exertion of the judicial power of the North Carolina Courts. We have previously cited several cases, both State and Federal, showing that the owner of a restaurant has a right to choose his patrons for any reason

that pleases him. In addition, we have already cited several cases showing that this same rule applies to various forms of private enterprises other than restaurants and that absent a statute to the contrary the owner controls the patronage of his premises and limits the access to his premises under such limitations as he chooses. A custom or usage as to what races or groups shall eat meals together in accordance with the approval of the owner is not invalid unless it violates a previously established constitutional right. The question is well stated in 46 Virginia Law Review 128, where the author of the note says:

> "Therefore, to state a cause of action, the victim of private discriminations must show that enforcement by the state will deprive him of a constitutional or statutory right which exists apart from the mere fact that state enforcement is present. Although the Fourteenth Amendment prohibits any racial discrimination by a state activity, it imposes no duty upon the state to protect an individual from private discrimination."

A state in enforcing its trespass statutes against trespassers who have been warned to leave the premises is not inducing others to discriminate but is upholding the property owner's rights even if the end result is private discrimination. As previously pointed out in our Statement of Facts, the petitioners were preparing for their case in court, and it is admitted that they could enter part of the store and make purchases at the various counters, and this is said to give the petitioners the right to go anywhere in the store that they desire. Great stress is also placed upon an implied invitation to come into the store but up to this time such implied invitation or license has always been revocable. We think the Supreme Court of North Carolina is supported by the great weight of judicial authority in this Nation when it said in this case:

> "In an Annotation in 9 ALR, p. 379, it is said: 'It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if

> he refuses to leave when requested to do so.' The Annotation cites cases from eight states supporting the statement. See to the same effect, BROOKSIDE—PRATT MIN. CO. v. BOOTH, 211 Ala. 268, 100 So. 240, 33 ALR 417, and Annotation in 33 ALR 421."

This same principle was also stated by Mr. Justice Holmes in TERMINAL TAXICAB CO. v. KUTZ, 241 U. S. 252, 256, 60 L. ed. 984, 987, 36 S. Ct. 583, when writing for the Court he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been, in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *".

The general trespass statute of North Carolina (G. S. 14-134) is a neutral statute, and there is not the slightest evidence in the record that this statute nearly a century old was directed toward or designed for any racial purposes. There is not the slightest evidence in the record that its administration over the decades in which it has been in effect has been directed towards the colored race as being singled out from other groups. We have already given an instance in which our trespass laws were used to protect an old colored woman as against the depredations of six white men in cutting and carrying off her timber. In the case before the Court the statute was enforced against two white persons along with the colored persons. It was not enforced at the instance of the State or at the instance of any State officer for it is clear from the record that the Manager of the Corporation requested the Durham Police to take action. The statute is available for the protection of colored people engaged in private enterprise as well as white people, and this, therefore, does not represent a case of State enforcement through indiscriminate imposition of inequalities. Even though the proprietor of a cafe or restaurant may be prompted by the motive of color it is

the person who trespasses and who refuses to leave whatever may be the color or race.

We have heretofore thought that the lawyer could choose his partner or his clients on any basis that he privately adopted and that seemed proper to him. We never thought that because there was an implied invitation to enter his office, which may border on the public street, that a lawyer had to accept a colored client under the Fourteenth Amendment if he did not want to do so. The same would be true as to doctors, dentists and all skilled and professional people who offer their services to the public.

This Court has been careful to say in cases decided where state action was concerned that private discrimination was not involved. For example: In SHELLEY v. KRAEMER, 334 U. S. 1, 92 L. ed. 1161, 68 S. Ct. 836, involving discriminatory covenants held to be in violation of the Fourteenth Amendment in which the courts were resorted to for enforcement, this Court said:

> "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (UNITED STATES v. HARRIS, 106 U. S. 629, 27 L. ed. 920, 1 S. Ct. 601; UNITED STATES v. CRUIKSHANK, 92 U. S. 542, 23 L. ed. 588)

In BOYNTON v. VIRGINIA, 364 U. S. 454, 5 L. ed. 2d 206, 81 S. Ct. 182, this Court held that a restaurant in a bus terminal could not conduct business in a segregated manner because of the Interstate Commerce Act; this Court, however, said:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

Apparently general trespass statutes have been recognized in an indirect manner by this Court as being valid. In MARTIN v. CITY OF STRUTHERS, 319 U. S. 141, 147, 87 L. ed. 1313, 63 S. Ct. 862, Mr. Justice Black said:

"Traditionally, the American Law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least 20 states, while similar statutes of narrower scope are on the books of at least 12 states more. * * *"

In MARSH v. ALABAMA, Title 14, Sec. 426 of the Alabama Code, made it a crime to enter or remain on the premises of another after having been warned not to do so. The appellant, a Jehovah's Witness, came on the sidewalk in the company-owned town, stood near the post office and undertook to distribute religious literature. This Court did not in any wise question the validity of the trespass statute but simply held that the company-owned town was such a part of the functioning community that the channels of communication must remain free and that the results of the trespass statute were inapplicable or insulated by reason of freedom of press, speech and religion.

In BREARD v. ALEXANDRIA, 341 U. S. 622, 95 L. ed. 1233, 71 S. Ct. 920, this Court on balancing the rights of the parties said it would be a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents.

There are certain cases relied upon by petitioners which we do not think are pertinent or applicable to this situation. In this line of cases there were definite constitutional rights to be protected, and there was action on the part of the state and these cases represent discrimination in areas of governmental activity. They pertain, for example, to situations where a state grants a franchise to a public utility (BOMAN v. BIRMINGHAM TRANSIT COMPANY, 5 Cir., 280 F. 2d. 531; BROWDER v. GAYLE, 142 F. Supp. 707, aff'd. 353 U. S. 903; FLEMING v. SOUTH CAROLINA ELEC. & GAS CO., 4 Cir., 224 F. 2d 752). There is also a line of cases where a state or a subdivision of a state operates restaurants, playgrounds, parks or other facilities, either itself or through its lessee, in which there can be no discrimination (BURTON

v. WILMINGTON PARKING AUTHORITY, 365 U. S. 715, 6 L. ed. 2d 45, 81 S. Ct. 56; DERRINGTON v. PLUMMER, 5 Cir., 240 F. 2d 922; CITY OF GREENSBORO v. SIMKINS, 4 Cir., 246 F. 2d 425; DAWSON v. BALTIMORE, 4 Cir., 220 F. 2d 386, aff'd. 350 U. S. 877). The same rules also are settled in the school cases, such as the Brown Case and the Bolling Case.

The right to use, enjoy and manage property, as well as to own property, existed before the Constitution of the United States was adopted, and while it is true that the use of property has been regulated for reasons of health, suppression of nuisances, fire protection, and in the realm of public utilities, this has not destroyed the right of the owner to have such persons as he chooses on his property. We quote some excerpts as to the rights of property owners, as follows:

> "The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." (11 Am. Jur., Constitutional Law, Sec. 335)

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one whom he can make contacts, and if he is wrongfully deprived of this right he is entitled to redress." (MYERS v. MEMPHIS, 135 Tenn. 263; Ann. Cas. 1918 C, 856 (272)).

> "Every man has the right to labor or refuse to labor for another, and he may base such refusal on any grounds he may choose, and even on mere whim, preju-

dice or malice. The right to labor or to employ labor and to make contracts with respect thereto, upon such terms as may be agreed upon, besides being a property right, is incident to the freedom of the individual, and is as fully protected by law as any other personal or private right." (6 R. C. L. 268, 269 (Sec. 253) note 10)

"Since it is the inherent and inalienable right of every man freely to deal, or refuse to deal, with his fellowman, the free and untrammeled right to contract is a part of the liberty guaranteed to every citizen, and as being within the protection of the fourteenth amendment to the Constitution of the United States." (6 R. C. L. 269; 270 (Sec. 254) notes 16, 17 and 18)

"The invitation may be limited at will. No one has a right to demand admission or consideration, and this may be denied arbitrarily. Under such circumstances discrimination against persons because of their color is not a violation of any right recognized by law. Such discrimination represents a social distinction, which, although arbitrary and sometimes extremely exasperating, has no remedy under law." (5 R. C. L. 586(10), 56 Am. Rep. 355, 1 L.R.A. 1188, 25 N.W. 766)

C

*The Attaining of a License from the State to Operate a Restaurant*

It is the contention of the petitioners that because the operator of the luncheonette in this case was required to obtain certain State licenses this converts the operator into a person who is able to take state action, and, therefore, his action in having the petitioners expelled from the premises is state action. This question was raised in the case of WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, supra, where the Court said:

"The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities * * * The license laws of Virginia do not fill the void. Sec. 35-26 of the Code of Virginia, 1950, makes it unlawful for any

person to operate a restaurant in the State without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served."

The same argument was made in SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., supra, where the Court said:

"The license laws of the State of Maryland applicable to restaurants are not regulatory * * * The City Ordinance, No. 1145, November 27, 1957, adding Sec. 60-1/2 to Article 12 of the Baltimore City Code, 1950 Edition, which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes state or city officials to control the management of the business of a restaurant or to dictate what persons will be served.

"Even in the case of licensees, such as racetracks and taverns, where the business is regulated by the State, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment."

In the case of MADDEN vs QUEENS COUNTY JOCKEY CLUB, 296 N. Y. 249, 72 N. E. 2d 697, the Court said:

"A license . . . is no more than a permission to exercise a pre-existing right which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligations to the public * * * Adopting plaintiff's position, it would be equally valid to argue that every licensee, theater manager, cab driver, barber, liquor dealer, dog owner—to mention a few—must be regarded as 'an administrative agency of the state' in the conduct of his everyday business simply because he pays a tax or fee for his license."

It is clear that a license from the Government does not

create an area of governmental assistance or convert a private business into such a public business that the owner or operator is endowed with the capacity of state action. It is a form of regulation as to sanitation or adequate food refrigeration accompanied in most cases by tax, and anyone who meets the requirements can be licensed. Such regulation cannot be dogmatically equated with state control or action so as to bring into play the operation of the Fourteenth Amendment, and state action is not the equivalent of the state's conditions required to operate a restaurant.

D

*The Operation of a Restaurant is Not a Business Affected with Public Interest or Public Service.*

The petitioners are in a position of persons who have a pre-determined objective, and in order to arrive at this objective they wish to dispense with the requirement of state action in the Fourteenth Amendment, and if this is not possible they wish to equate private action with state action by transforming all business operations into businesses affected with the public interest.

It is unnecessary to discuss the public service or public interest concept and trace it from the case of MUNN v. ILLINOIS, 94 U. S. 113, 24 L. ed. 77, because this Court has clearly defined and described the businesses that are affected with the public interest or, more correctly, businesses engaged in the performance of public service. These are usually such things as telephone companies, water companies, electrical companies, and transportation companies. This Court has further clearly stated that it did not include all businesses in these categories, although the businesses may have public features and aspects. For example: In WILLIAMS v. STANDARD OIL CO., 278 U. S. 235, 49 S. Ct. 115, 73 L. ed. 287, the State of Tennessee undertook to declare through its legislature that the business of selling gasoline was one affected with the public interest and to fix the prices for which gasoline could be sold within the State. In disposing of this argument, this Court said:

"It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 27 A. L. R. 1280, 43 Sup. Ct. Rep. 630; Tyson & Bro.-United Theatre Ticket Offices v. Banton, supra; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 52 A. L. R. 163, 47 Sup. Ct. Rep. 506; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 56 A. L. R. 1327, 48 Sup. Ct. Rep. 545. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect granted to the public. Tyson & Bro.-United Theatre Ticket Offices v. Banton, supra, p. 434 (71 L. ed. 724, 58 A. L. R. 1236, 47 Sup. Ct. Rep. 426). Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id. p. 430. The meaning and application of the phrase are examined at length in the Tyson Case, and we see no reason for restating what is there said.

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the busi-

ness of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case."

In the case of NEW STATE ICE CO. v. LIEBMANN, 285 U. S. 262, 52 S. Ct. 371, 76 L. ed. 747, the State of Oklahoma declared that the manufacture, sale and distribution of ice was a public business and that no one could be permitted to manufacture, sell and distribute ice within the State without first having secured a license. It was further provided that there must be a necessity at the place desired, to be found by the Corporation Commission, before the license would be issued. Action was brought to restrain the defendant, who was operating without a license, and in holding that this was not such a business as was affected by the public interest and that the defendant was entitled to operate his business under the protection of the Fourteenth Amendment, this Court said:

"It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. Frost v. Corporation Commission, 278 U. S. 515, 519-521, 73 L. ed. 483, 487, 488, 49 S. Ct. 235. In that view, engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common right to be exercised independently (ibid.) by any competent person conformably to reasonable regulations equally applicable to all who choose to engage therein."

"Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a busi-

ness as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use."

In the case of WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS, 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103, the State of Kansas undertook to place a packing company under the jurisdiction of the Court of Industrial Relations whereby wages could be fixed and other terms for the future conduct of the industry. The Wolff Packing Company was engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. The Kansas Act declared that the business was affected with the public interest. In holding the Kansas Act to be unconstitutional this Court said:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. State v. Edwards, 86 Me. 102, 25 L.R.A. 504, 41 Am. St. Rep. 528, 29 Atl. 947; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 254, 60 L. ed. 984, 986, P.U.R. 1916(D), 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916(D), 765.

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and

have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly. (Citations omitted)

"It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes (United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 540; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256, 60 L. ed. 984, 987, P. U. R. 1916(D), 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916(D), 765); and while this feature does not necessarily exclude businesses from the class clothed with a public interest (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915(C), 1189, 34 Sup. Ct. Rep. 612), it usually distinguishes private from quasi public occupations."

See also: TYSON & Bro. v. BANTON, 271 U. S. 418, 47 S. Ct. 426, 71 L. ed. 718, and cases there cited.

We submit, therefore, that to hold that the operation of the restaurant business is a business devoted to public service or is a business affected with the public interest would have results not desired by the people of this Nation. If this logic is carried to its ultimate limits instead of being protected by the Fourteenth Amendment all businesses would be socialized and brought under government control. If this position of petitioners is sound, then the cafe owner and the merchant cannot fix the prices of their services and products but some government agency would be required to do so. If this position is sound, then the steel mills should be required to produce their cost records, and the President should have been allowed to have seized the property of the steel companies so as not to imperil the national defense (YOUNGSTOWN SHEET & TUBE CO. v. SAWYER, 343 U. S. 579, 72 S. Ct. 863, 96 L. ed. 1153).

E

*The Case of Shelley v. Kraemer is Not Applicable to this Situation.*

Ever since the decision in SHELLEY v. KRAEMER, 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161, a sustained effort has been made to apply this doctrine to all inequalities. It is submitted that the case has no application to this situation at all. In the first place the petitioners, who were Negroes, acquired the property subjected to the restricted covenant by warranty deed; in other words, the sale of the property between the parties concerned was by mutual agreement and was voluntary. Those who tried to enforce the restrictive covenant were third parties. In this case there is no agreement between the parties, but, to the contrary, there is disagreement in that the owner of the restaurant does not desire the presence of petitioners on his property, and in exercising his choice of customers he warned them to leave. In the second place in refusing to permit judicial

action on the part of the state for the enforcement of the restrictive covenant this Court was but giving effect to the freedom of all people of all races to acquire property without being hampered by racial obstructions. This Court was enforcing a federal statute which said: "All citizens of the United States shall have the same right, in every state and territory, as it is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This Court was careful to say that "Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color", and that "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." In the Shelley Case, therefore, the petitioners had a constitutional and statutory right to be protected and that was the equal right with all others to acquire and enjoy property.

The case is not an authority for the theory that all private activity enforced by court action is prohibited state activity. As said by the author in an article entitled: "The Impact of Shelley v. Kraemer on the State Action Concept" (44 Calif. Law Review, p. 733):

> "If obtaining court aid to carry out 'private' activity 'converts' such private action into 'state' action, then there could never be any private action in any practical sense. So entwined are our lives with the law that the logical result would be that almost all action, to be effective, must result in state action. Thus, all private activity would be required to 'conform' with the standards of conduct imposed on the states by the Fourteenth Amendment. Under the guise of protecting civil rights by 'strengthening' due process and the equal protection of the laws, is it not possible that Shelley creates a means of restricting civil liberties, making possible far greater government control of individual activity than desired?"

The case simply stands for the proposition that the courts

cannot be used to allow a person to commit an act forbidden the states by the Fourteenth Amendment. If other rights intervene, such as those of the property owner, they, too, are entitled to protection under the Fourteenth Amendment and court action would be proper.

## IV

## THE GENERAL TRESPASS STATUTE OF NORTH CAROLINA DOES NOT VIOLATE THE FOURTEENTH AMENDMENT BECAUSE OF VAGUENESS OR FAILURE TO FURNISH AN ASCERTAINABLE STANDARD OF CONDUCT.

The petitioners attack the general trespass statute of North Carolina (G. S. 14-134) under the so-called "void for vagueness" rule of constitutional law.

Here again for the convenience of the Court we quote the statute, as follows:

> "G. S. 14-134. *Trespass on land after being forbidden.*— If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

The petitioners could not have been ignorant of this statute or of what constituted prohibited conduct. The petitioners had counsel and had consulted counsel about these matters (R. 37), and certainly neither petitioners nor their counsel were ignorant of the holding of the Supreme Court in STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295, and counsel for the petitioners were certainly aware of STATE v. COOKE, 248 N. C. 485, 103 S. E. 2d 846. The case of STATE v. CLYBURN, supra, explains fully the violation of possession or what constitutes criminal trespass showing that this interpretation was not a new thing. We have heretofore explained in this brief that the statute is almost a century old and its concepts came from England with the Common Law and

that it is allied with or related to G. S. 14-126 on forcible entry and detainer, which is almost word f word a copy of 5 Richard II, enacted by the British Parli ent.

When we get down to the specific examination of statutes we find that the North Carolina statute under attack is no more vague or indefinite than the statute relied upon by petitioners, such as 14 USCA 1983, which was construed in SCREWS v. UNITED STATES, 325 U. S. 91; 65 S. Ct. 1031, 89 L. ed. 1495. When this federal statute was attacked upon the same ground, that is when the Congress did not define what it desired to punish but referred the citizen to a comprehensive library in order to ascertain what acts were prohibited, this Court upheld the act by reference to its historical framework and by referring to the fact that this was an effort of Congress extending over a period of over 80 years. Our statute is no more vague or indefinite than the Sherman Antitrust Act and the companion statute referred to as the Clayton Act. Our statute is no more vague or indefinite than the statute prohibiting interstate transportation in aid of racketeering enterprises (18 USCA 1952). Our statute is no more vague and indefinite than the federal statute which prohibits the asking or receiving of any money by a federal officer or employee for the purpose of influencing his decision on any matter. (18 USCA 201, 202). The General Statute of this State on trespass is no more vague and indefinite than the laws of any state, or, for that matter, of the Federal Government, on punishing for fraud and false pretenses.

As said in the annotation in 96 L. ed. 375:

> "Moreover, few words possess the precision of mathematical symbols; most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded."

However, not every statute stated in general terms is held to be unconstitutional, and, therefore, invalid under this rule.

In 82 C. J. S. (Statutes) p. 108, sec. 68-a, the author says:

"A statute is not rendered uncertain and void merely because general terms are used therein, or because of the employment of a term, without defining it, where such term is one commonly used or understood, or where such term is one that has acquired a well defined meaning, is sufficiently known or understandable to enable compliance with the statute, or has acquired an established meaning through established precedents, technical knowledge, or the sense and experience of men.

"A statute is not rendered invalid for uncertainty merely because of the employment of a term which may be judicially noticed, or whose meaning can be determined with little difficulty, or can be determined when read in connection with the context. The mere fact that a term used in a statute might, under some imaginary circumstances, be considered ambiguous will not render the statute inoperative as regards matters plainly falling within the meaning of such term. Ordinarily, where the terms used are suitable to the subject matter, they are sufficiently certain. The employment of novel and unfamiliar terms, which have not yet acquired any definiteness or certainty, to define a statutory duty sought to be imposed may, however, render invalid the statute in which they are employed; and the employment of terms unknown to the common law and also shown to have no well defined meaning in a particular industry to which they are directed may invalidate the statute in which they are used. Repetition of certain words in a section of an act does not render the section void for uncertainty where it is manifest from reading the paragraph that the repetition does not obscure the meaning.

"An act will not be held invalid merely because it might have been more explicit in its wording or detailed in its provisions, especially where, because of the nature of the act, it would be impossible to provide for all the details in advance, unless it is so imperfect as to render it impossible to execute it."

In 50 Am. Jur. (Statutes) p. 486, sec. 473, the author states:

"Sec. 473.—*Restrictions upon Invalidation for Uncertainty.*—The basis of the principle that courts will not,

'in doubtful cases, pronounce a legislative act to be contrary to the Constitution, applies with equal force where the courts are called upon to declare a statute to be so meaningless and unintelligible as to be inoperative, and there are many cases in which claims that particular statutes or statutory provisions are void for indefiniteness have been rejected. This is frequently illustrated in the construction of statutes regulating the operation of motor vehicles, and motor vehicle carriers, licensing of operators and other related matters. The use of such terms as 'reasonable' or 'unreasonable' in defining standards of conduct or in prescribing charges, allowances and the like, and the use of such terms as 'wilful and wanton misconduct' or 'gross negligence', 'diligent effort', 'dishonorable conduct', 'incompetence', 'violation of professional duty', etc., have been held not to render a statute invalid for uncertainty and indefiniteness. Other applications of the principle are indicated in the footnote. From these cases it is evident that absolute or mathematical certainty is not required in the framing of a statute. A statute is not necessarily void merely because it is vague, indefinite, or uncertain, or contains terms not susceptible of exact meaning, or is stated in general terms, or prescribes a general course of conduct, or does not prescribe precise boundaries, or is imperfect in its details, or contains errors or omissions, or because the intention of the legislature might have been expressed in plainer terms, and questions may arise as to its applicability, and opinions may differ in respect of what falls within its terms, or because the statute is difficult to execute. A statute will not be declared void for vagueness and uncerainty where the meaning thereof may be implied, or where it employs words in common use, or words commonly understood, or words previously judicially defined, or having a settled meaning in law, or a technical or other special meaning well enough known to enable persons within the reach of the statute to apply them correctly, or an unmistakable significance in the connection in which they are employed. In short, legislation otherwise valid will not be judicially declared null and void on the ground that the same is unintelligible and meaningless unless it is so imperfect and so deficient in its details as to render it impossible of execution and enforcement, and is susceptible of no reasonable construction that will support and give it effect, and the court finds itself unable to define the purpose and intent of the legislature. Moreover, the objection that a statute is too vague to be valid is available only to one whom it concerns."

In WILLIAMS v. UNITED STATES, 341 U. S. 97, 71 S. Ct. 576, 95 L. ed. 774, the Supreme Court of the United States had before it an attack upon a Civil Rights Statute (18 USCA 242) which is perhaps the most indefinite and the vaguest statute in the Federal Criminal Code. The statute reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . ..., shall be fined not more than $1,000, or imprisoned not more than one year, or both."

In disposing of this contention the Court said:

> "Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific."

In the case of SCREWS v. UNITED STATES, 325 U. S. 91, 65 S. Ct. 1031, 89 L. ed. 1495, the Supreme Court of the United States again upheld this same Civil Rights Statute as against the same type of constitutional attack, the Supreme Court saying:

> "But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."

In the case of OMAECHEVARRIA v. IDAHO, 246 U. S. 343, 38 S. Ct. 323, 62 L. ed. 763, the Supreme Court of the United States had before it a statute written in very general terms and which is quoted in the case as follows:

> "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suf-

fers the same to be herded, grazed, or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer, or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

In upholding this statute against an attack of void for vagueness, the Court said:

"It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guaranty by the 14th Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a 'range', or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; Miller v. Strahl, 239 U. S. 426, 434, 60 L. ed. 364, 368, 36 Sup. Ct. Rep. 147 . . . . ."

In the case of NASH v. UNITED STATES, 229 U. S. 373, 57 L. ed. 1232, the Supreme Court of the United States considered this type of attack upon the Monopoly or Antitrust Statute. In upholding the statute Mr. Justice Holmes said:

"And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court.

Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919:

> "But apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. . . . ."

We could quote from many cases and cite many other statutes written in general terms that have been upheld but for the sake of brevity we shall merely refer to a few more cases and the type of statute considered.

In FOX v. WASHINGTON, 236 U. S. 273, 35 S. Ct. 383, 59 L. ed. 573, a statute of the State of Washington which made it unlawful to print, publish, or knowingly circulate any book, paper or document advocating or inciting the commission to any crime, breach of the peace or act of violence, was upheld with Mr. Justice Holmes writing the opinion. This statute was stated in general terms.

In WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095, the Criminal Syndicalism Act of California, which prohibited teaching or advocating the commission of crime, sabotage, unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, was upheld as against this type of attack.

In GORING v. UNITED STATES, 312 U. S. 19, 61 S. Ct. 429, 85 L. ed. 488, the Supreme Court had before it on this same type of attack the Espionage Act of June 15, 1917. The words "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation", were said to be sufficiently definite for a criminal statute.

In UNITED STATES v. RAGAN, 314 U. S. 513, 62 S. Ct.

374, 86 L. ed. 383, the Supreme Court of the United States upheld a provision of the Revenue Act of 1932, declaring guilty of a felony, simply said: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or any payment thereof" as not being too vague or a delegation of power. As against the same charge the clause "a reasonable allowance for salaries or other compensation for personal service actually rendered" was also upheld. The Court upheld the rule that a successful attack based on undue vagueness cannot be made where the sanctions of the statute apply only if intent or scienter is first established.

See also on this point the following authorities:

BOYCE MOTOR LINES v. UNITED STATES, 342 U. S. 337, 72 S. Ct. 329, 96 L. ed. 367;

ROTH v. UNITED STATES, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. 2d 1498;

UNITED STATES v. PETRILLO, 332 U. S. 1, 67 S. Ct. 1538, 91 L. ed. 1877;

MILLER v. STRAHL, 239 U. S. 426, 36 S. Ct. 147, 60 L. ed. 364;

BEAUHARNAIS v. ILLINOIS, 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725;

COLE v. ARKANSAS, 338 U. S. 345, 94 L. ed. 155, 70 S. Ct. 172;

UNITED STATES v. WURZBACH, 280 U. S. 396, 50 S. Ct. 167, 74 L. ed. 508.

See also the following Law Review articles:

21 Michigan Law Review 831;

40 Cornell Law Quarterly 195;

30 Yale Law Journal 437;

62 Harvard Law Review 77;

109 University of Pennsylvania Law Review 67.

## V

## THE NORTH CAROLINA STATUTE AS ADMINISTERED DOES NOT VIOLATE FREEDOM OF SPEECH AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The petitioners' claim that their constitutional right to freedom of speech is violated by the administration of the North Carolina statute is the least tenable of all their arguments. The record fully shows that the petitioners and those affiliated with them had for days been exercising their right of protest and freedom of speech by statements and slogans on placards or banners which they carried up and down the streets in front of the stores, including the store of S. H. Kress & Company.

Freedom of speech is not a protective armor with which petitioners can cover themselves and take possession of other owners' property and violate any statute they choose. The petitioners can cover themselves with an atmosphere or aura of free speech for any of their predetermined objectives and this would protect them from the violation of any law. They could force their entrance in and upon any property, including the home, and so long as they carried a placard with printed words and kept talking in support of some cause they would be insulated from the application of all criminal statutes.

It is submitted that even the right of freedom of speech has its reasonable and well justified limitations.

In the case of INTERNATIONAL BROTHERHOOD v. HANKE, 339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995, this Court said:

"Here, as in HUGHES v. SUPERIOR COURT, 339 U. S.

460, ante., 985, 70 S. Ct. 718, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protective freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid'. * * * The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the state to set the limits of permissible contest open to industrial combatants'."

In this same case this Court further said:

"A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect."

In KOVACS v. COOPER, 336 U. S. 77, 69 S. Ct. 448, 93 L. ed. 513, this Court sustained an ordinance which limited the right of communication through loud speakers. In this connection the Court said:

"Of course, even the fundamental rights of the Bill of Rights are not absolute. The SAIA case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, SCHENCK v. UNITED STATES, 249 U. S. 47, 52, 63 L. ed. 470, 473, 39 S. Ct. 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.'

"Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

In the case of MILK WAGON DRIVERS UNION v. MEADOWMOOR DAIRIES, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836, the Court sustained an injunction against picketing where there was a history of past violence against a plea of freedom of speech and distinguished the case from that of THORNHILL v. ALABAMA, 310 U. S. 88, 84 L. ed. 1093, 60 S. Ct. 736 cited by the petitioners, and said:

> "This is precisely the kind of situation which the Thornhill opinion excluded from its scope. 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U. S. 105, 84 L. ed. 1104, 60 S. Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coersive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

In GITLOW v. NEW YORK, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138, this Court sustained a conviction based upon the New York statutes, dealing with *criminal anarchy*, as against a defense of freedom of speech.

In BREARD v. CITY OF ALEXANDRIA, 341 U. S. 622, 71 S. Ct. 920, 95 L. ed. 1233, this Court held constitutional a municipal ordinance which prohibited peddlers from calling upon occupants of private residences without having been requested or invited to do so.

In GIBONEY v. EMPIRE STORAGE & ICE CO., 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834, it was held that the constitutional right of free speech did not preclude an injunction against peaceful picketing by an ice peddlers' union for the purpose of coercing a wholesale distributor to agree to refrain from selling ice to peddlers not members of the union. In this connection this Court said:

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech and writing used as an integral part of conduct in violation of a criminal statute. * * * Neither THORNHILL v. ALABAMA, 310 U.S. 88, 84 L. ed. 1093, 60 S. Ct. 736, supra, nor CARLSON v. CALIFORNIA, 310 U. S. 106, 84 L. ed. 1104, 60 S. Ct. 746, both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. * * * It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. See, e. g., FOX v. WASHINGTON, 236 U. S. 273, 277, 59 L. ed. 573, 575, 35 S. Ct. 383; CHAPLINSKY v. NEW HAMPSHIRE, 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade, as well as many other agreements and conspiracies deemed injurious to society."

Unless the petitioners had a right, along with their associates, to come in and take possession of a private owner's property, then this portion of petitioners' argument could not possibly be sustained.

## VI

## CONCLUSION

It is not the contention of the State of North Carolina that property rights cannot be regulated. However, what the petitioners demand in this case goes much further towards the abridgement of property and indeed towards the socialization of property than anyone has ever thought proper since this Nation secured its independence in the American Revolution. If this Court grants the request of petitioners then the owner of the bare legal title of property will be

subjected to such intense social regulation that it will be analogous to property held in the corporative state.

When this Court decided BROWN v. MISSISSIPPI, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682, the members of this Court no doubt never dreamed that a course of action had been initiated that would lead to such expansive federal review of state criminal cases. The logic of petitioners in this case, if sustained, will not leave any place where people of the same tastes, affinities, congenialities and race can meet together in a club, in the home, or any other place of assembly because all of these places are to some extent regulated by the state.

Petitioners realize that their logic, as derived from their premises, leads to great extremes and they try to hedge against these extremes. For example, must the petitioners be given entrance to the office of the manager and must they be allowed to go to the stockroom? Suppose the clerks tell petitioners that they do not have certain articles and the petitioners think they can find some of the articles in the stockroom, can they go to the stockroom over the protest of the management? Suppose private proprietors are compelled to sell to petitioners, at what price must they sell? If a private proprietor sold articles or food to his friends at no cost or at a cheaper rate than usual, would this violate petitioners' civil rights? Under their own theory, why should not petitioners be allowed to enter into any private home they desire so long as they say that they are protesting and exercising free speech? The petitioners' request should not be granted unless the Court thinks we should have a completely socialized state. There should be left to an individual some property rights that he can call his own or else why should we have the institution of private property? We ask the Court not to take such a step and in this connection we again remind the Court of the language this Court used in civil rights cases (109 U. S. 3) when it said:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable

> concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected."

Under the decisions of this Court it is abundantly clear that state action, as contemplated by the Fourteenth Amendment, does not include purely private action. (CIVIL RIGHTS CASES, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835; UNITED STATES v. CRUIKSHANK, 92 U. S. 542, 23 L. ed. 588; VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667; EX PARTE VIRGINIA, 100 U.S. 339, 25 L. ed. 676; CORRIGAN v. BUCKLEY, 271 U S. 323, 46 Sup. Ct. 521, 70 L. ed. 969)

We respectfully submit that the Supreme Court of North Carolina decided this case in a valid and constitutional manner and should be upheld.

Respectfully submitted,

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**Nos. 11, 58, 66, 67, and 71**

# In the Supreme Court of the United States

OCTOBER TERM, 1962

JOHN THOMAS AVENT, ET AL., PETITIONERS

*v.*

STATE OF NORTH CAROLINA

RUDOLPH LOMBARD, ET AL., PETITIONERS

*v.*

STATE OF LOUISIANA

JAMES GOBER, ET AL., PETITIONERS

*v.*

CITY OF BIRMINGHAM

F. L. SHUTTLESWORTH, ET AL., PETITIONERS

*v.*

CITY OF BIRMINGHAM

JAMES RICHARD PETERSON, ET AL., PETITIONERS

*v.*

CITY OF GREENVILLE

*ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH CAROLINA, LOUISIANA, AND SOUTH CAROLINA, AND TO THE COURT OF APPEALS OF ALABAMA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 11

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*v.*

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CITY OF GREENVILLE

*ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH CAROLINA, LOUISIANA, AND SOUTH CAROLINA, AND TO THE COURT OF APPEALS OF ALABAMA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE [1]

### OPINIONS BELOW

The opinion of the Supreme Court of North Carolina in *Avent* (A. 72–90) [2] is reported at 253 N.C. 580, 118 S.E. 2d 47.

The opinion of the Supreme Court of Louisiana in *Lombard* (L. 141–151) is reported at 241 La. 958, 132 So. 2d 860. The opinion of the Criminal District Court of Orleans Parish overruling petitioners' motion to quash (L. 28–86) is not reported.

The opinion and orders of the Alabama Court of Appeals (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278) and the orders of the Supreme Court of Alabama (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278) in *Gober* are reported, *inter alia*, at 133 So. 2d 697–708.

The opinions of the Alabama Court of Appeals (S. 42–44, 67) and the orders of the Supreme Court of Alabama (S. 46, 69) in *Shuttlesworth* are reported at 134 So. 2d 213.

---

[1] This brief will not consider *Wright* v. *Georgia*, No. 68. Since that case involves arrests for unlawfully assembling on *municipal* property, it does not present the paramount issue considered in the cases discussed in this brief as to the rights of private businesses to exclude Negroes from all or a portion of their premises. We believe, however, that the convictions in *Wright* should be reversed for reasons advanced by the petitioners in that case. The United States, as *amicus curiae*, is filing a separate brief in *Griffin* v. *Maryland*, No. 26, this Term.

[2] The records in *Avent* v. *North Carolina*, No. 11, *Lombard* v. *Louisiana*, No. 58, *Gober* v. *Birmingham*, No. 66, *Shuttlesworth* v. *Birmingham*, No. 67, and *Peterson* v. *Greenville*, No. 71, are referred to as "A.," "L.," "G.," "S.," and "P.," respectively.

The opinion of the Supreme Court of South Carolina in *Peterson* (P. 55–59) is reported at 122 S.E. 2d 826. The opinion of the Greenville County Court (P. 50–52) is not reported.

## JURISDICTION

The judgment of the Supreme Court of North Carolina in *Avent* was entered on January 20, 1961 (A. 90).

The judgment of the Supreme Court of Louisiana in *Lombard* was entered on June 29, 1961 (L. 149).

The judgments of the Alabama Court of Appeals in *Gober* were entered on May 30, 1961 (G. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278). Petitions to the Supreme Court of Alabama for writs of certiorari were denied on September 14, 1961 (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278); and applications for rehearing were overruled on November 2, 1961 (G. 71, 92, 128, 144, 182, 194, 224, 236, 266, 278.)

The judgments of the Alabama Courts of Appeals in *Shuttlesworth* were entered on May 30, 1961 (S. 43, 66). Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (S. 45, 68). A petition to the Supreme Court of Alabama for a writ of certiorari was denied on September 25, 1961 (S. 46, 69), and application for rehearing was overruled on November 16, 1961 (S. 51, 74).

The judgment of the Supreme Court of South Carolina in *Peterson* was entered on November 10, 1961 (P. 55), and a petition for rehearing was denied on November 30, 1961 (P. 62).

The petitions for writs of certiorari were granted by this Court on June 25, 1962 (370 U.S. 934–935; A. 92, L. 152, G. 279, S. 75, P. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

Petitioners are Negroes who were invited into department and variety stores as customers. They were refused service at lunch counters or in lunch rooms under the proprietor's practice of enforcing racial segregation in the store's dining facilities. In Nos. 11, 66, 67 and 71, there was little evidence as to motive, but the proprietor's practice of racial discrimination in fact conformed to current municipal ordinances requiring racial segregation in public eating places. In No. 58, although there was no ordinance specifically requiring segregation in public eating places, the proprietor's practice of racial discrimination knowingly conformed to a current and pervasive State policy of maintaining racial segregation expressed in numerous legislative enactments and official declarations. Petitioners in each case refused to leave the lunch counters or lunch rooms upon being denied service. They were arrested and convicted of criminal trespass or a similar offense.

The questions presented are:

1. Whether, upon the records in Nos. 11, 66, 67 and 71, the convictions are sufficiently related to the ordinances requiring racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether, upon the record in No. 58, the convictions are sufficiently related to the State laws and policies maintaining racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

## INTEREST OF THE UNITED STATES

The fundamental constitutional issue in these cases is to what extent the Fourteenth Amendment condemns, as a denial of equal protection of the laws, enforcement by the States of racial segregation in private businesses open to the general public. This problem involves not only the power of the States but also the constitutional rights of millions of American citizens. On the one hand, millions of Negroes (as well as some other groups) are subjected to racial discrimination in private businesses open to the public. The "sit-in" activities resulting in petitioners' convictions were part of a widespread peaceful protest against this practice. Petitioners claim that the involvement of the States in their convictions violates the equal protection clause of the Fourteenth Amendment. On the other hand, the respondents invoke both the power of the States to preserve order, and also the freedom and responsibility of individuals to make their own decisions concerning the use of private property and choice of associates. Thus, the basic issue in these cases involves the competing claims of large numbers of citizens, and of the States, and is of grave importance to the country as a whole.

The petitions for certiorari in each of these cases urge various grounds for reversal. Since the primary interest of the United States is in the fundamental question which is described above, we will confine this brief on behalf of the United States to a discussion of that question.

## STATEMENT[3]

### 1. AVENT V. STATE OF NORTH CAROLINA, NO. 11

*a. Statutes Involved.*—Chapter 13, Section 42, of the Code of Durham, North Carolina (1947), provides:

> In all licensed restaurants, public eating places and 'weenie shops' where persons of the white and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense.

Petitioners were convicted of violating Section 14–134 of the North Carolina General Statutes, which provides:

> *Trespass on land after being forbidden.* If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor and on conviction, shall be fined not

[3] We have set forth fully only the facts of each of the cases that may be relevant to the legal issues that we consider in this brief.

exceeding fifty dollars or imprisoned not more than thirty days * * *.

*b. The Facts.*—On May 6, 1960, petitioners, five Negro students from North Carolina College and two white students from Duke University, both of which are in Durham, North Carolina, entered Kress' Department Store in Durham (A. 1, 2, 4, 5, 6, 8, 9, 35). On the two selling floors of the store, there are approximately fifty counters (including a "standup" lunch counter) which serve Negroes and whites without racial distinction (A. 21, 22). No sign at the store's entrance barred or conditioned Negro patronage (A. 22). Petitioners made various purchases, as some of them had in the past, and eventually went to the basement lunch counter (A. 21, 35, 39, 41, 43, 46, 47, 48).[4] There a sign stated "Invited Guests and Employees Only" (A. 23). The manager testified that, although no invitations as such were sent out, white persons automatically were considered guests; Negroes, and whites accompanied by Negroes, were not

[4] Petitioners were participants in an informal student organization which opposed racial segregation. They believed that they had a right to service at Kress' basement lunch counter after having been customers in other departments (A. 36, 40, 44–45). Some had previously picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (A. 41, 43, 46, 48, 49). Some of the petitioners had requested and had been denied service on previous occasions at Kress' lunch counter (A. 37). Some of the petitioners testified that they expected to be served at the basement lunch counter because they had been served upstairs (A. 39, 48, 49). Various petitioners testified that they did not expect to be arrested for trespassing on this occasion (A. 37, 38, 41, 43, 48, 49).

(A. 21–23).[5] The counter was separated from other departments by an iron railing (A. 21). The store manager testified that the entrances to the counter were chained, but petitioner Streeter denied this (A. 21, 37).

The manager declined to serve the students and asked them to leave (A. 21). He stated that if Negroes wanted service they might obtain it at a stand-up counter upstairs (A. 22). The manager then called the police (A. 21). After being asked by the police officers to leave, petitioners persisted in their refusal and were arrested for trespass (A. 21, 24–25).[6]

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[5] The manager testified that "the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees" (A. 21). He testified further that "We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson [petitioners' Negro attorney], I do not consider you an invited guest, under the circumstances right now. I do consider Mr. Murdock [the State Solicitor] an invited guest under the circumstances" (A. 22). He also testified: "I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave" (A. 23).

Portions of the record suggest that the police were already present at the time the manager first asked the students to leave (A. 35, 40, 42, 44, 47, 48). For example, petitioner Phillips testified that "When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, 'You are not an invited guest, and you are not an employee; so I am asking you to leave.' Before I could ask him who he was, the police officer directed me to the back of the store" (A. 40).

[6] It is not clear whether, after the arrival of the police officer, the manager again asked petitioners to leave (compare A. 21 with A. 24–25).

Petitioner Nelson, one of the white students, was asked to leave after she offered food to Negroes. The manager told her

The Kress manager explained his refusal to serve the students at the trial (A. 22–23):

> * * * It is the policy of our store to wait on customers dependent upon the customs of the community. * * * It is the policy of our store to operate all counters in the interest of the customs of the community. * * * In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangements. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. * * * It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner (A. 1–10):

> with force and arms, * * * did unlawfully, willfully, and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store * * * said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and

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that she was "antagonizing the customers" (A. 42). Petitioner Brown was told by the manager that "[t]he custom has not been changed, and you will have to leave" (A. 44).

> agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said [petitioner] after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that * * * [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state.[7]

Petitioners pleaded not guilty and were tried by a jury on June 30 and July 1, 1960 (A. 15–16). The jury returned a verdict of guilty (A. 16). Three of the petitioners received thirty-day sentences; one received a twenty-day sentence, one received a fifteen-day sentence, and, in two cases, sentence was continued for two years (A. 16–20).

On January 20, 1961, the Supreme Court of North Carolina affirmed the convictions (A. 73). In a lengthy opinion, the court emphasized that (A. 78):

> No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants,[8] and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute for-

[7] The indictments of all the petitioners carried a racial designation, *viz.*, "CM," "WM" "CF," and "WF" (A. 2, 3, 5, 6, 7, 9, 10).

[8] A municipal ordinance in Durham, however, does require segregation in restaurants. See *supra*, p. 6.

bidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. * * *

2. LOMBARD V. STATE OF LOUISIANA, NO. 58

*a. Statute Involved.*—The Louisiana statute under which petitioners were convicted is La. R.S. 14:59(6), as amended 1960, which provides:

> Criminal mischief is the intentional performance of any of the following acts:
>
> * * * * * *
>
> (6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

The statute states that "[w]hoever commits the crime of criminal mischief shall be fined not more than $500.00, or imprisoned for not more than one year, or both."

*b. The Facts.*—On September 10, 1960, one week prior to the "sit-in" demonstration out of which this case arose, a group of Negroes conducted at Woolworth's Department Store in New Orleans, Louisiana, the first "sit-in" demonstration to occur in that city. On the same day, the New Orleans Superintendent of

Police issued the following statement, which was published in the New Orleans *Times-Picayune* (L. 17, 139–140):

> The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.
>
> We urge every adult and juvenile to read this statement carefully, completely and calmly.
>
> First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.
>
> We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.
>
> We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.
>
> Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.
>
> At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

> No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.
>
> As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.
>
> We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.
>
> Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana.[*]

On September 13, 1960, four days prior to the "sit-in" demonstration out of which this case arose, Mayor DeLesseps Morrison also issued a statement which was printed in the *Times-Picayune*. The Mayor said (L. 14, 15, 138–139):

> I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.
>
> The police department, in my judgment, has handled the initial sit-in demonstration Friday

[*] At the trial of the petitioners in *Lombard*, the Superintendent of Police testified that the reason for his statement was that he "was hoping that situations of this kind would not come up in the future to provoke any disorder of any kind in the community" (L. 17).

and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

Act 70 of the 1960 Legislative session redefines disturbing the peace to include "the commission of any act as would foreseeably disturb or alarm the public."

Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

Act 80—obstructing public passages—provides that "no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demon-

strations cease and that henceforth they be prohibited by the police department.[10]

On September 17, 1960 (one week after the Superintendent's statement and four days after the Mayor's statement), the petitioners here, three Negroes and one white person, sat down at counter seats at the white refreshment counter at McCrory's Five and Ten Cents Store in New Orleans. McCrory's, which "caters to the general public," is a branch of a national chain doing business in thirty-four states (L. 19).

Although no sign indicated any racial restriction as to service, the counter where petitioners sat had been restricted to white patronage since 1938 (L. 105, 110). The counter manager (Mr. Graves) advised petitioners that he could not serve them there and that

[10] The Mayor testified at petitioners' trial that the superintendent of police "serves under [the Mayor's] direction," and that "[i]t is the policy of my office and that of the City Government to set the line or direction of policy to the police department" (L. 13). The Mayor further testified that his statement was issued "following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law" (L. 14). He testified that his statement "encompasse[d] any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious" (L. 16).

they could be served at a colored counter in the rear of the store (L. 105, 110). The petitioners made no reply (L. 105). Although petitioners were not creating a disturbance or doing anything except sitting at the counter (L. 108), Mr. Graves closed the counter because Negroes were present (L. 105, 108). Petitioners nonetheless remained seated. The police were called by store personnel (L. 107), and the store manager, Mr. Barrett, arrived (L. 112). Shortly thereafter several police officers arrived (L. 112). Mr. Barrett informed the police that he wanted the Negroes to leave, but an officer informed him that he must request them to leave in the presence of the police (L. 126). The police then witnessed Mr. Barrett's request to the petitioners that they leave the counter area (L. 113). When petitioners did not leave, a police officer, Major Reuther, informed them that they were violating the law "and if the manager insisted that they move we would have to put them under arrest" (L. 129). After a short period, the police arrested petitioners (L. 129), who were charged with criminal mischief under La. R.S. 14:59(6), *supra*, p. 10.

Testimony was adduced at a hearing on petitioners' motion to quash the information and at the trial on the merits concerning the reasons that petitioners were not served at the counter. The store manager testified that he exercises discretion as to whether Negroes should be served [11] (L. 21), and that "[t]he policy

[11] Mr. Barrett testified that he was authorized by the "national office" of McCrory's chain to determine the segregation policies of the New Orleans store (L. 21). The trial court

[as to serving Negroes] is determined by local tradition, law and custom, as interpreted by me" (L. 21). The manager testified further that when, as occasionally happened, Negroes sought service at a white lunch counter he "would tell them we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs" (L. 117–118).[12]

When asked whether "in the last 30 to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems" (L. 22) the manager replied that "[w]e have spoken of it" (L. 23).

Mayor Morrison and the Superintendent of Police testified concerning the custom in New Orleans with respect to segregated eating facilities. The Mayor stated that to his personal knowledge no lunch counter in the city served both Negroes and whites together (L. 15). The Superintendent of Police testified that, in his experience as a member of the police force for fifteen years, and as a resident of New Orleans, he had not known of "any public establishments that cater to both Negroes and whites at the same lunch counter in the city of New Orleans" (L. 18).

The trial court refused to allow a series of questions designed to ascertain whether the manager's decision

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sustained objections to questions designed to reveal the practice of McCrory's stores in other states (L. 19–20, 22) and the power of the national office to overrule a manager's decision (L. 22).

[12] Mr. Barrett also replied "[y]es, sir" to counsel's question whether his decision was based on "state policy and practice and custom in this area" (L. 25).

was dictated or influenced by "state policy." Thus, Mr. Barrett was not permitted to say whether he "discussed methods and means to handle these situations if they arise in any particular department store" (L. 23), although counsel observed that the "purpose of this Your Honor is a question of conformity with state policy" (L. 23). Again, the manager was not allowed to reply to questions as to whether "if the state policy or practice would be different you would exercise your discretion in a different manner" and whether "if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters" (L. 25, 26). Similarly, the trial court ruled out a question to Mr. Graves, the counter manager, as to "why [he was] not allowed to serve them," despite counsel's contention that the question was "material, because if Mr. Graves felt there was some state policy that prevented him from serving these defendants this is a clear state action" (L. 109–110).[13]

The trial court also excluded a series of questions designed to ascertain whether the police had been actively involved in the manager's decision to refuse service to petitioners. Captain Cutrera, one of the arresting officers, was not permitted to say whether

[13] Petitioners introduced into evidence a series of bills, some of which were ultimately enacted into law, of the 1960 session of the Louisiana state legislature. Petitioners contended that these bills and statutes (including the criminal mischief statute under which petitioners were convicted) demonstrated a state policy of racial discrimination (see L. 26–27 and the opinion of the Louisiana Supreme Court, quoted *infra*, p. 19).

"there was any plan approved by the police as to what [the store personnel] should do in the event of a sit-in" (L. 127–128). And Mr. Barrett was not allowed to reply to the question whether he had "ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?" (L. 23). Similarly, counsel was not allowed to determine whether Mr. Graves had called the police "on his own initiative;" the question was asked in order to learn whether he had "any plan * * * with the police" (L. 107).[14]

Petitioners were convicted of violating the "criminal mischief" law, sentenced to sixty days in jail, and fined $350 each (L. 8). The convictions were affirmed by the Supreme Court of Louisiana. *State* v. *Goldfinch*, 132 So. 2d 860, 241 La. 958 (1961) (L. 141–149). The State Supreme Court rejected the contention that "by content, reference and position of context [the statute] is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them" (L. 145), stating (L. 145–146):

> * * * In aid of this assertion certain House bills of the Louisiana legislature for 1960, introduced in the same session with the contested statute, were offered in evidence. All of these bills did not become law, but some did. It is declared that this law and the others enacted

[14] Mr. Graves did testify at another point that he had called the police "as a matter of routine procedure," and that he had "no particular plan" for the handling of sit-ins; they were to be handled like any other emergency situation (L. 106).

during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

The court also considered the contention that "the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and * * * that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state" (L. 146). It held (L. 146–147):

The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. * * *

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the pro-

prietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. * * *

The court further held that no constitutional provision prevented a proprietor of a restaurant from refusing service on the basis of race. It said (L. 148):

> The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and hence state action is involved. * * *

In answer to this contention, the court stated that "segregation of the races * * * is not required by any * * * law of the State * * * but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires" (L. 148).

3. GOBER V. CITY OF BIRMINGHAM, NO. 66

*a. Statutes Involved.*—Section 369 of the General City Code of Birmingham, Alabama (1944), provides:

> *Separation of races.*—It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.

Petitioners were convicted of violating Section 1436 of the General City Code of Birmingham, Alabama (1944), which provides:

> *After warning.*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

*b. The Facts.*—This case involves ten different petitioners. On March 31, 1960, the petitioners, in five groups of two, entered five department stores in the City of Birmingham. The facts relating to each of the cases are as follows:

(i) *Gober* and *Davis.*—Petitioners entered Pizitz's Department Store in Birmingham, Alabama (G. 43, 50). Petitioner Davis purchased stocks, toothpaste, and a handkerchief (G. 43). They then proceeded to the mezzanine lunch counter where they attempted to

order, but were ignored by the waitresses (G. 44). Although only white persons were seated at the lunch counter at the time, there was no sign indicating that the counter was reserved for whites (G. 44, 50). Petitioners were approached by Mr. Pizitz, assistant to the president of the store. Pizitz, who did not identify himself to petitioners, told them that Negroes were served elsewhere in the store (G. 23, 44–45). They were not directly asked to leave the store or the area in which they were sitting (G. 45). Mr. Pizitz's conversation with petitioners was described as follows (G. 23–24):

> He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.
>
> * * * * *
>
> He told them that they couldn't be served there and we had facilities in the basement to serve them. * * * He told them it would be against the law to serve them there. * * *

Mr. Gottlinger, the controller of Pizitz's, testified that no official of Pizitz called the police (G. 26). He also testified that no official of the company filed a complaint (G. 27).

Police Officer Martin of the Birmingham Police made the arrests (G. 19). He had received a report from a superior officer that there was a disturbance at Pizitz's (G. 19). He went to the dining area, found it closed to customers, and saw two Negro men seated and conversing together (G. 18–19). Martin heard no one speak to petitioners (G. 19). Following the direction of his superior, and without

himself warning petitioners, Martin placed them under arrest and charged them with trespassing after warning (G. 20).

(ii) *Hutchinson* and *King*.—Petitioners took seats at tables in the mezzanine dining area at Loveman's Department Store (G. 107, 115). Loveman's is a general department store and invites Negro trade in all departments with the exception of dining facilities (G. 114, 120). The dining room is a concession run by the Price Candy Company but follows Loveman's policies and regulations (G. 114).[15]

Soon after petitioners were seated, Mr. Kidd, a member of the store's protective department, appeared.[16] At the trial, he described what occurred in these terms (G. 115):

> There was two colored boys sitting on the mezzanine and I notified the people who were milling around, I notified all of the people, white people, to leave as we were closing the mezzanine in their presence—I did not directly speak to the two colored boys who were sitting at a table * * *.[17]

Mr. Kidd announced three times that the dining area was closed and put up signs to that effect (G.

[15] Mr. Schmid, the dining area concessionaire, testified that he knew of no dining facilities in Loveman's for Negroes (G. 113–114). However, Mr. Kidd of Loveman's protective department testified that the store did have separate dining facilities for Negroes (G. 119).

[16] Apparently, a restaurant employee called the protective department (G. 112). According to Mr. Schmid, this had been done since, "naturally," there was a "disturbance of the peace" (G. 112). The only actual disturbance described, however, was that "* * * the waiters went off the floor" (G. 112).

[17] Mr. Schmid likewise did not speak to petitioners (G. 116).

116).[18] About forty or fifty people were seated at the time these announcements were made, and some of them apparently stayed and finished their lunches (G. 111).

About twenty-five white patrons were seated when the police arrived, but none were arrested (G. 113).[19]

There is nothing in the record to indicate who called the police.[20] Police officer Martin, who arrested petitioners, had been told by a motorcycle policeman to go to Loveman's (G. 107). At the dining area, he observed a rope tied from one post to another and a sign stating that the area was closed (G. 107). He saw two Negro men at a table but had no conversation with them "other than to tell them they were under arrest" (G. 107). Officer Martin did not know of his own personal knowledge that anyone from Loveman's had asked petitioners to leave but believed that his superior officer knew this (G. 108).[21] Martin

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[18] When asked what caused him to close the lunchroom, Kidd testified: "The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd had dispersed that the two colored boys were occupying a table" (G. 117). The commotion Kidd referred to was the people standing up and milling around (G. 117).

[19] Mr. Kidd testified, however, that everyone left immediately when he announced the closing of the lunch-room (G. 118).

[20] Mr. Schmid did not know who called the police and testified that his secretary and cashier had instructions to call the store detective in case of disturbances (G. 112).

[21] Apparently at about the time of the arrest, Police Lieutenant Purvis approached Mr. Schmid and stated that "someone called us that you had two people in here that were trying to be served * * *" (G. 112). Schmid pointed to petitioners (G. 112).

charged petitioners with trespass after warning (G. 109).

(iii) *Parker* and *West*.—Petitioners entered Newberry's, a variety store open to the general public (G. 158, 165). There are two lunch counters in Newberry's for white customers—one on the first floor where these "sit-ins" occurred and one in the basement (G. 163). There is a Negro lunch counter on the fourth floor which has a "for colored only" sign (G. 163, 166).

At least one of the petitioners made purchases of paper and books (G. 170). They then sat at the lunch counter (G. 158–159). No sign at the lunch counter indicated that it was reserved for whites (G. 166, 171). When Mrs. Gibbs, the store detective, saw the petitioners, she (G. 162):

> * * * went over to the lunch counter * * * and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.

Assistant Store Manager Stallings also spoke with petitioners (G. 164):

> Well I asked them, I said, "You know you can't do this." I said, "We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there."

Mr. Stallings did not call the police, did not make a complaint to the police, and did not know whether

anybody else did [22] (G. 165). Police officer Myers was directed by a radio call from police headquarters to proceed to Newberry's (G. 158–159). Myers understood that a fellow officer had received a complaint from a Mr. Stallings, whose capacity at the store—or even whether he was an employee of Newberry's—Myers did not know (G. 160–161). At Newberry's, he encountered something "out of the ordinary," *viz.*, "[t]wo colored males were sitting at the lunch counter" (G. 158). Myers did not speak with petitioners nor did he witness a conversation among petitioners and any store employee (G. 159). Nevertheless, Myers arrested petitioners for trespass after warning.[23]

(iv) *Sanders* and *Westmoreland*.—Petitioners entered the Kress dime store in Birmingham, a general department store soliciting the trade of the general public (G. 214–215). It has no food service facilities for Negroes (G. 215), who are, however, invited to buy food and bakery items to carry out (G. 218). White and Negroes purchase from the same counters at other departments (G. 216).

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[22] Stallings, when asked "Did any other official at Newberry's call the police?," replied: "Someone, now I don't remember who this person was, but someone said to me that we called the police. I don't know who it was. I don't remember that" (G. 165).

[23] Petitioner West testified that when officer Myers arrived on the scene he began to motion white people away from the lunch counter but all of them did not leave (G. 172). "After he started motioning the white people away," West stated, "we started to get up and when we started to get up one got me in the back or somewhere in behind. * * * After I saw him motioning other people up I said, 'Let's go.' And we started to get up" (G. 172).

After petitioners sat down at a bay in the lunch counter, Kress' lunch counter manager told them "we couldn't serve them and they would have to leave" (G. 211). After the manager turned out the lights in the bay in which petitioners were sitting, petitioners moved to another (G. 211). The manager then closed down all the bays and turned out all the lights in the bays (G. 212).

Officer Caldwell, upon receiving a call to go to Kress' store, went to the basement and observed that the lunchroom was closed and "two black males" were "sitting there" (G. 209). The manager then informed the policeman, in the presence of petitioners, that "they couldn't be served and he had turned the lights out and closed the counter" (G. 209).[24] Two policemen entered the bay where petitioners were seated and twice asked them to get up (G. 212). After additional policemen entered, officer Caldwell arrested petitioners, although no one had asked him to do so (G. 209, 210), and the officers escorted petitioners from the store (G. 212).[25]

(v) *Walker* and *Willis*.—Petitioner Walker entered Woolworth's store to purchase handkerchiefs and a birthday gift for a friend (G. 255). Petitioner Willis purchased various non-food items (G. 255).

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[24] The officer did not hear anyone tell petitioners to leave the counter (G. 210). The counter manager had not called the police, requested an arrest or signed a complaint. Nor did the store manager do any of these things in the counter manager's presence (G. 213–214).

[25] A woman already seated at the counter remained after the "closing" and, so far as the counter manager knew, was not arrested (G. 217–218).

They were not refused service at any non-food counter (G. 257–258), and Walker testified that he "really expected service" at the lunch counter because he "had been served prior to coming to the [lunch] counter" (G. 259).

Petitioners proceeded to the lunch counter and sat down (G. 255). There were no signs indicating that the lunch counter was reserved for whites (G. 257). A waitress said to petitioner, "I'm sorry I can't serve you," but they remained seated at the counter (G. 256).

Two police officers arrived in response to a call from the Birmingham police radio (G. 252). Mrs. Evans, the manager of the lunch counter, informed one officer that "she had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them" (G. 252–253).[26] Officer Casey testified that no one directly instructed the police to arrest petitioners (G. 253–254), but that he understood Mrs. Evans' "complaint" that "she wanted the boys out of the store" as a request to remove them (G. 253). When asked "did you take it upon yourself to make these arrests," officer Casey replied: "I did under authority of the City of Birmingham" (G. 253).

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[26] This was the testimony of police officer Casey. Petitioner Walker, on the other hand, testified that no one connected with the store management had ever asked petitioners to leave, and that he did not see Mrs. Evans at the store at the time of the incident (G. 256).

Some white customers were ordered to leave the counter, and one was forced to do so by the police but was not arrested (G. 256). Finally a policeman "asked [petitioners] to leave," saying, "Let's go," and informed them that they were under arrest (G. 257). Officer Casey testified that at the time of arrest or shortly thereafter he informed petitioners that they had been arrested for trespass after warning (G. 254).

The complaint against each of the ten petitioners charged that he or she "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as * * * [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944" (G. 2–3, 73–74, 93, 129, 145, 183, 195–196, 225, 237, 267). Petitioners were convicted in the Recorder's Court of the City of Birmingham. On appeal, they then received successive trials *de novo* in the Circuit Court of Jefferson County with the same judge, prosecutor and defense counsel.

At the first trial (*Gober* and *Davis*), petitioners tried to question a store official concerning the segregation ordinance of the City of Birmingham (Section 369 of the City Code of Birmingham) (G. 24–25):

> Mr. HALL [counsel for petitioners]. * * * It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the

segregation law and not because it was Pizitz policy.

* * * * *

Mr. HALL. As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

The COURT. Does the complaint cite some statute?

Mr. HALL. Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

The court refused to permit the store official to be interrogated about his knowledge of the law, on the ground that the reason that the store excluded petitioners was immaterial (G. 25–26). During the *Parker* and *West* trial, petitioners' counsel likewise attempted to establish that petitioners were arrested because of the segregation policies of the City of Birmingham and not because of any policy of the store (G. 166–168). The court again ruled that this line of inquiry was not "competent" (G. 168).

Petitioners were again adjudged guilty in the Circuit Court and, in a common sentencing proceeding, were fined $100 and given thirty days' hard labor, with additional time for failure to pay the fine and court costs[27] (G. 10–11, 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272). The Alabama Court of Appeals, affirming the conviction, wrote an opinion for the first case, *Gober* v. *State of Alabama,* and affirmed all others in brief *per curiam* orders citing *Gober* (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278). In its opinion in *Gober,* the Court of Appeals stated that 'there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (G. 63). The court noted that petitioners were licensees and entered the premises by implied invitation and that, under such circumstances, the owners of the premises had the right to place limitations as they saw fit (G. 63). "It is fundamental," the court held, "and requires no citation of authority, the grantor of a license, which has not become coupled with an interest, may revoke the license at will" (G. 64). The Supreme Court of Alabama denied certiorari in all the cases by identical orders (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278).

[27] For example, petitioner Gober was sentenced to 52 days of hard labor for failure to pay his $100 fine and the $5 costs accrued in the Recorder's Court, and to an additional 60 days of hard labor for failure to pay the costs accrued in the Circuit Court. The State of Alabama also was authorized to recover from Gober the costs expended for feeding Gober while he was in jail (G. 11; see also G. 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272).

4. SHUTTLESWORTH V. CITY OF BIRMINGHAM, NO. 67

*a. Statutes involved.*—Petitioners were convicted of violating Section 824 of the General City Code of Birmingham, Alabama (1944). Section 824 provides:

> It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor.

Sections 369 and 1436 of the Birmingham code, which are also involved, are set forth above at page 22.

*b. The Facts.*[28]—The record shows that James Gober (one of the petitioners in the *Gober* case (see *supra*, pp. 22-24) went to petitioner Shuttlesworth's home on March 30, 1960 (S. 27-28). Shuttlesworth, his wife, several students from Daniel Payne College, and petitioner Billups, who had driven one of the students to Shuttlesworth's home, were present (S. 28, 31). Petitioner Shuttlesworth "asked for volunteers to participate in the sit down demonstrations" (S. 29). A "list," not otherwise described, was prepared (S. 30). One student "volunteered to go to Pizitz [a department store] at 10:30 [a.m.] [the next day] and take part in the sit down demonstrations" (S. 31). Shuttlesworth "didn't say that he would furnish Counsel but told him or made the announcement at that time that he would get them out of jail" (S. 31-32).

[28] The record of the trial court proceedings in this case consists largely of testimony of a city detective in the Circuit Court of Jefferson County describing the evidence adduced at an earlier trial of petitioner Shuttlesworth for the offense in the city recorder's court. Objections were regularly made to this testimony by the defendants on hearsay grounds (see, *e.g.*, S. 24-25).

Gober and other students present at the meeting did participate in a "sit-in" demonstration, not otherwise described, on the next day, March 31, 1960 (S. 33).

Petitioners Shuttlesworth and Billups were charged with violating Section 824 of the Code of Birmingham, *supra,* by inciting or aiding or abetting "another person to go or remain on the premises of another after being warned not to do so," in violation of Section 1436 of the Birmingham Code, *supra* (S. 2, 53). They were convicted by the city recorder's court. On appeal to the Circuit Court of Jefferson County, they were separately tried *de novo.* Petitioners Shuttlesworth and Billups were again convicted by the court sitting without a jury, and sentenced, respectively, to 180 days hard labor and a $100 fine, and 30 days' hard labor and a $25 fine (S. 40).

The convictions were affirmed by the Court of Appeals of Alabama. The court stated, in the *Shuttlesworth* case, that "'[e]veryone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed'" (S. 44). It also held (S. 44):

> There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

In the *Billups* case, the Court of Appeals simply adopted the findings of fact and the legal conclusions set forth in the *Shuttlesworth* case (S. 67). On September 25, 1961, the Supreme Court of Alabama denied writs of certiorari in both cases, and on November 16, 1961, rehearings were denied (S. 46, 69).

5. PETERSON V. CITY OF GREENVILLE, NO. 71

*a. Statutes Involved.*—Section 31–8, Code of Greenville, South Carolina, 1953, as amended in 1958, provides:

> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> (a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;
>
> (b) Separate tables, counters or booths;
>
> (c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;
>
> (d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;
>
> (e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Petitioners were convicted of violating Section 16-388, Code of Laws of South Carolina, 1952, as amended in 1960, which provides:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

*b. The Facts.*—At about 11:00 a.m. on August 9, 1960, petitioners, ten Negro students, took seats at the lunch counter at the Kress department store in Greenville, South Carolina, and requested service (P. 1, 19, 36). The Kress store in Greenville is open to the general public; it has fifteen to twenty departments and sells over 10,000 items (P. 21). Negroes and whites are invited to purchase and are served alike, except that Negroes are not served at the lunch counter (P. 21).

When petitioners requested service at the lunch counter, they were told by a Kress employee, "I'm sorry, we don't serve Negroes" (P. 19, 36). Petitioners refused to leave, and G. W. West, the Kress

manager, directed that the police be called (P. 22).[29]

Captain Bramlette of the Greenville Police Department received the call to proceed to the Kress store (P. 7). He was told that there were young colored boys and girls seated at the lunch counter (P. 10). Captain Bramlette testified that he did not know the origin of the telephone call (P. 7, 10). When Captain Bramlette, with several city policemen, arrived at the store, he found two agents of the State Law Enforcement Division already present at the lunch counter (P. 7).[30] In the presence of the police officers, the lunch counter lights were turned off and manager West requested "everybody to leave, that the lunch counter was closed" (P. 19, 15).[31] At petitioners' trial, their counsel was denied permission to ascertain whether this request followed arrangement or agreement with the police (P. 23, 24–25). After

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[29] Doris Wright, one of the petitioners, testified that on an earlier occasion she had spoken to the Kress manager about the stores' policy of lunch counter segregation and was assured that charges would not be pressed against Negroes who sought service (P. 38).

[30] The South Carolina Law Enforcement Division was organized to assist local law enforcement officers. Officer Hillyer of the Division, present at the time of the incident, testified that his immediate superior is Chief J. P. Strom, who is directly under the authority of the Governor of South Carolina (P. 43).

[31] Petitioner Wright testified that the request to leave was made by the police and not by Mr. West (P. 37). She denied that Mr. West asked her or any of the other petitioners to leave (P. 41). When asked, "Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?" she replied, "Yes, I am, Mr. West, come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed" (P. 41).

about five minutes,[32] during which petitioners had made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest for trespassing (P. 19).[33] Store manager West did not request that petitioners be arrested (P. 16, 24).

White persons were seated at the counter when the announcement to close was made but none were arrested (P. 19). Mr. West testified that, when the lights went out, the white customers departed (P. 19). But a white customer testified that, at the time of the arrests, some white persons were still seated at the counter (P. 30–31). As soon as petitioners were removed by the police, the lunch counter was reopened (P. 23).

Manager West testified that he closed the counter because of local custom and because of the Greenville city ordinance requiring racial segregation in eating facilities (P. 23):

> Q. Mr. West, why did you order your lunch counter closed?
>
> A. It's contrary to local custom and it's also the ordinance that has been discussed.
>
> Q. Do I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs?
>
> A. Yes, sir.
>
> Q. And that is why you closed your lunch counter?

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[32] There is some conflict in the record regarding the time lapse between the announcement that the counter was closed and the arrests (see P. 29, 37, 38, 45).

[33] Four other Negroes were also arrested but their cases were disposed of by the juvenile authorities (P. 7).

A. Yes, sir, that's right."[34]

The record is conflicting as to whether Captain Bramlette thought he was acting under the Greenville segregation ordinance or the State trespass law. At one point, the Captain testified that he did not have the city ordinance in mind when he went to Kress but was thinking of the recently passed State trespass statute (P. 11). When asked however, why he arrested petitioners, he said (P. 15):

> A. Under the State Law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order.
>
> Q. But the State Law that just passed and signed by the Governor in May doesn't mention anything about Negroes sitting at lunch counters, does it?
>
> A. It mentions sit-ins.

However, after refreshing his recollection, the Captain conceded that the new State law did not mention sit-ins (P. 15). He further testified as follows (P. 16–17):

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette?
>
> A. He did not.
>
> Q. He did not?
>
> A. No.
>
> Q. Then why did you place them under arrest?
>
> A. Because we have an ordinance against it.
>
> Q. An ordinance?

[34] Mr. West testified (P. 21) that the policy of following local custom was prescribed by Kress' headquarters.

A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there?

A. State law in mind when I went up there.

Q. And that isn't the ordinance of the City of Greenville, is it?

A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind?

A. You asked me have I, did I have knowledge of the City ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State ordinance in my mind.

Q. I see and so far this City ordinance which requires separation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest?

A. In my opinion the State law was passed recently supersedes our City ordinance.[35]

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, of violation of the South Carolina trespass law and sentenced to pay a fine of one hundred dollars or serve thirty days in the city jail (P. 47). Petitioners appealed to the Greenville County Court, and their appeal was dismissed on

[35] Although the trial judge appears to have denied petitioners' motion to make the Greenville segregation ordinance a part of the record (P. 46–47), it nevertheless has been incorporated into the record (P. 49).

March 17, 1961 (P. 50). That court noted that the trespass statute was merely a reenactment of the common law which permits a property owner to order any person from his premises whether they be an invitee or an uninvited person and that the constitutionality of the statute was unquestioned (P. 50–51). The court rejected petitioners' contention that they had a right to be served (P. 52).

On November 10, 1961, the Supreme Court of South Carolina affirmed the judgment and sentences (P. 55). It held that the operator of a privately owned business may accept some customers and reject others on purely personal grounds, in the absence of a statute to the contrary (P. 58). The court also held that there was nothing in the record to substantiate a claim that petitioners were actually prosecuted under the Greenville segregation ordinance (P. 59). The Supreme Court denied rehearing on November 30, 1961 (P. 62).

## ARGUMENT

### INTRODUCTION AND SUMMARY

We believe it important at the outset to define, and if possible limit, the issue in these cases.

The Fourteenth Amendment provides:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

In the *Civil Rights Cases*, 109 U.S. 3, decided shortly after the adoption of the Fourteenth Amendment, this Court held that the Amendment drew a fundamental distinction between a State's denial of

equal protection of the laws and discrimination by private individuals, however odious. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" (*id.*, p. 11).

For a century, this basic postulate has been consistently applied in the courts. This brief does not question its validity. On the one hand, a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of his neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. For, in a civilized community, where legal remedies have been substituted for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws.

With respect to these "sit-in" cases it has been argued most broadly that the requisite State action is to be found in the arrests by the police, the prosecutions and the convictions, and that since discrimi-

nation against Negroes resulted from this State action, it violates the constitutional guarantee of equal protection of the laws. Cf. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. L. Rev. 473. Our example of the private residence and swimming pool is to be distinguished (the argument runs, upon the ground that, although that case too would involve State action and thus raise a federal constitutional question if there was an arrest and prosecution, nevertheless, the owner's right of privacy should outweigh the neighbor's claim to be free from racial discrimination. Against this, the States will no doubt argue that the two cases are alike because the State does not deny equal protection of the law when it indiscriminately offers to support the decision of the private landowner without regard to the landowner's reasons.

We believe that this bro d issue need not, and should not, be decided in the cases at bar. We express no opinion upon it. We assume *arguendo* that in the absence of other grounds for holding the State responsible the principle invoked by the States is applicable to uninvited entrants upon business property, where the business is neither subject to a legal duty to serve the public (as in the case of inns and common carriers) nor owned or managed by one exercising sovereign functions. In our view, however, the principle is not applicable to the present cases.

One significant difference is that these cases do not involve in any substantial sense the landowner's privilege of deciding whom he will bar from his

premises and whom he will invite upon them as social guests or business visitors. In these cases the Negroes were invited into the store and were lawfully on the premises. In the *Lombard* case, for example, McCrory's Five and Ten Cent Store caters to the general public, both whites and colored, and even at the lunch counter restricted to white patronage there was no sign indicating the restriction. The situation was substantially the same in *Peterson, Gober* and *Shuttlesworth*. The all-white lunch room in *Avent* was expressly restricted to "invited guests," which perhaps impliedly excluded the petitioners in that case, but all other portions of the store were open to Negroes and their patronage was solicited without discrimination. The only real restriction, therefore, was a policy of refusing to allow white and colored to break bread together. Although this restriction can be cast in the language of the law of trespass by saying that the owner may revoke the consent to enter, the terminology cannot conceal the fact that the sole reason for revocation was petitioners' refusal to accept a stigma of social inferiority. While this circumstance may not directly bear upon the question of the States' responsibility, it plainly shows that no substantial claim to constitutional rights in private property is involved in these cases. Cf. *Marsh* v. *Alabama*, 326 U.S. 501, 505–507.[36]

[36] Also, Mr. Justice Frankfurter, concurring, said "And similarly the technical distinctions on which a finding of 'trespass' so often depends are often too tenuous to control [a] decision regarding the scope of the vital liberties guaranteed by the Constitution." 326 U.S. at 511. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Barrows* v. *Jackson*, 346 U.S. 249, 260.

Still more important in the cases at bar, the States, which instituted the prosecutions, share the responsibility for the invidious discrimination, so that the State denial of equal protection does not depend upon the arrests and prosecution alone. In the *Avent, Gober* and *Peterson* cases, municipal ordinances required racial segregation in public eating places. In the *Shuttlesworth* case, petitioners were convicted of aiding and abetting Negroes to sit in lunch counters reserved for whites in a city where an ordinance required segregation in restaurants. In the *Lombard* case, the State's laws and policies, effectively and persistently implemented throughout the community, had a similar effect, albeit there was no ordinance in terms requiring the exclusion of Negroes from the establishment in question.

Accordingly, we submit that the only question now requiring decision is whether, judged against the background of the owner's willingness to serve Negroes in other parts of the stores, the States' influence upon the owner's decision to discriminate in serving food, through explicit segregation ordinances in four cases and through a general policy of promoting racial segregation in the fifth, was sufficient on these records to make the States' activities, taken as a whole, a denial of equal protection of the laws. If so, the resulting convictions must be reversed.

It is one thing for the State to enforce, through the laws of trespass, exclusionary practices which rest simply upon individual preference, caprice or prejudice. It is quite another for the State, exercis-

ing as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered decisions of the citizens.

To sustain the judgments of conviction in the instant cases in the face of the segregation ordinances and official policies, the Court, we believe, would be obliged, at a minimum, to find (1) that the acts of discrimination were shown not to be a result of the State's laws and policies or of the actions of State officials and (2) that the petitioners, when ordered to leave the premises in question, were on notice that the proprietor was acting to assert his own rights, rather than in obedience to the State's unconstitutional command. In these cases, neither finding can be made. For aught that appears, the State, in each instance, laid the foundation for the criminal conviction by its own mandates of segregation.

## I

### THE CONVICTIONS OF THE PETITIONERS IN *Avent, Gober, Shuttlesworth* AND *Peterson* VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT MUST BE CONCLUDED THAT THE FORCE OF MUNICIPAL LAWS CAUSED THE PROPRIETORS TO DISCRIMINATE

While the petitioners in *Avent*, *Gober*, and *Peterson* were convicted of trespassing for refusing to leave racially segregated lunch counters, these cases

cannot be divorced from the fact that the allegedly criminal acts occurred in communities which had ordinances affirmatively requiring racial segregation at establishments where food is served. (The *Shuttlesworth* case, involving a charge of aiding and abetting the violation of Alabama's criminal trespass statute, turns on the same considerations which govern the *Gober* case.) The City of Durham, North Carolina (see *supra*, pp. 6–7),[37] the City of Birmingham, Alabama (see *supra*, p. 22), and the City of Greenville, South Carolina (see *supra*, pp. 35–36), all had ordi-

[37] In the *Gober* case, the Alabama Supreme Court held that the Birmingham ordinance was not properly pleaded and therefore was not before the court on appeal. This reasoning is plainly insubstantial, since it is well established that the Alabama courts can take judicial notice of municipal ordinances. See 7 Code of Alabama (1940), § 429(1); *Shell Oil* v. *Edwards*, 263 Ala. 4, 81 So. 2d 535; *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710; *Monk* v. *Birmingham*, 87 F. Supp. 538 (N.D. Ala.), affirmed, 185 F. 2d 859 (C.A. 5), certiorari denied, 341 U.S. 940. Therefore, the ordinance was properly before the Alabama courts and may be considered by this Court.

We recognize that the existence of the Durham segregation ordinance was not called to the attention of the courts below and that no argument based on that ordinance was advanced in the petition for certiorari in the *Avent* case. Nevertheless, on occasion, this Court has decided cases on a ground not raised below. See, *e.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1. This practice is particularly appropriate where it furthers this Court's historic refusal to adjudicate far-reaching constitutional questions except where such adjudication is absolutely necessary to the decision. See, *e.g.*, the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345–348. Accordingly, should this Court conclude that the existence of the segregation ordinances in

nances forbidding eating establishments from serving whites and Negroes on a nonsegregated basis. We submit that the decision of restaurant owners to discriminate under the compulsion of these ordinances constitutes State action in violation of the Fourteenth Amendment. From that, it necessarily follows that the arrest and conviction of persons for refusing to obey this decision to discriminate likewise violates the command of the Constitution.

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*Gober* and *Peterson* requires reversal of the convictions in these cases, we believe that a similar result should follow in *Avent*. Such a reversal in *Avent* would avoid consideration of any new constitutional issues not already decided in *Gober* and *Peterson*.

If this Court should conclude that it ought not take judicial notice of the Durham ordinance in deciding the case on the merits and that the constitutional issues raised, absent the ordinance, go substantially beyond anything required to be decided in the companion cases, it may wish to consider two other dispositions of the *Avent* case. One would be to remand the case to the Supreme Court of North Carolina for further consideration in the light of the decisions in any cases in which the segregation ordinances were given decisive significance. That court's rule with respect to judicial notice (see *Fulghum* v. *Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368, 371; *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, 300) might properly be affected by awareness of possible constitutional implications. And this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. The other course would be to consider whether the writ was providently granted in the *Avent* case. The well-established practice of refusing to decide difficult constitutional issues upon an inadequate record or in cases that do not require their decision would seem equally applicable to cases in which the constitutional issue is raised only because one of the parties failed to take advantage of another available defense. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

A. A MUNICIPAL ORDINANCE WHICH REQUIRES RACIAL SEGREGATION IN RESTAURANTS VIOLATES THE FOURTEENTH AMENDMENT.

The municipal ordinances involved in these cases are clearly unconstitutional. It is a fundamental principle of our constitutional system that the Fourteenth Amendment prohibits state-sanctioned racial segregation. This principle was recently applied to restaurants in *Turner* v. *City of Memphis*, 369 U.S. 350. There, a statute authorized the State Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations * * * as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants * * *" and made violation of such regulations a misdemeanor (*id.* at 351). The resulting regulation provided that "[r]estaurants catering to both white and negro patrons should be arranged so that each race is properly segregated" (*ibid.*). This Court left no doubt that such State-required racial discrimination was unconstitutional, stating (*id.* at 353):

> * * * our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483; *Mayor & City Council* v. *Dawson*, 350 U.S. 877; *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903; *New Orleans City Park Improvement Assn* v. *Detiege*, 358 U.S. 54. * * *

See also *Bailey* v. *Patterson*, 369 U.S. 31; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Morgan* v. *Virginia*, 328 U.S. 373; *Baldwin* v. *Morgan*, 287 F.2d 750 (C.A. 5).

B. THE STATE IS RESPONSIBLE FOR THE DECISION OF THE OWNERS OF A RESTAURANT TO DISCRIMINATE ON THE BASIS OF RACE WHEN THIS DECISION IS COMPELLED BY STATE LAW

1. If the owner of an establishment requests Negroes to leave a lunch counter reserved for whites because a State law requires the owner to maintain segregation, the prosecution of Negroes for criminal trespass for refusing to leave would be an implementation of the discriminatory State statute and would therefore violate the equal protection clause of the Fourteenth Amendment. While this Court has apparently never had occasion to pass directly upon the question, the lower courts have so held. Thus, in *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847, the Court of Appeals for the Fourth Circuit indicated that "actions * * * performed in obedience to some positive provision of state law" acquire the coloration of the State and are governed by the broad egalitarian requirements of the Fourteenth Amendment. In *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, the Fourth Circuit held that the racial segregation of passengers by a bus company, as required by State law, constituted action under color of State law. Similarly, the Court of Appeals for the Fifth Circuit has held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." *Baldwin* v. *Morgan*, 287 F. 2d 750, 755 (C.A. 5). It declared (*id.* at 756):

> * * * the State may not use race or color as the basis for distinction. It may not do so by direct action *or through the medium of others*

> *who are under State compulsion to do so.* * * *
> (Emphasis added.)

See also the earlier *Baldwin* v. *Morgan* case, 251 F. 2d 780, 789–790 (C.A. 5); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5).[38]

The rule enunciated in the above decisions, we believe, is clearly correct. A person who engages in racial discrimination under influence of the State's coercive authority is in no sense acting independently. Rather, he is acting in compliance with the will of the State, and the effect of his action is to carry out the State's policy of discrimination. Consequently, the discriminatory action, while performed by a private person, is a reflection of the State's law and policy. The State has "insinuated itself" into the private decision and "place[d] its authority behind discriminatory treatment based solely on color * * *" in the most forceful manner available to it, by the compulsion of its penal laws. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725, 727.

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[38] And see *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 845, 846 (C.A. D.C.) (Judges Bazelon and Edgerton dissenting):

"If a state statute affirmatively required restaurant owners to segregate their facilities or exclude Negro patrons, conduct of the restaurant owners caused solely by the compulsion of such a statute would be state action and would give rise to a claim for relief under [42 U.S.C.] § 1983. * * * When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer."

The majority opinion in *Hot Shoppes* did not reach this question.

Indeed, if actions compelled by statute are not considered State action, decisions of this Court proscribing State-imposed racial segregation (see *supra*, p. 48) may be largely circumvented. For the result is that State laws compelling private persons or organizations to discriminate are enforced through parallel statutes—like the trespass and criminal mischief statutes involved here. It may be argued that no businessman is bound to discriminate because, if he disobeys a State law which commands discrimination, he can challenge the constitutionality of the statute under which he has been convicted—if need be, in this Court. But a criminal law, with the power of the State behind it, has, until it is repealed, a powerful effect of its own. Ordinary citizens do not know that a particular law is not enforced or is unconstitutional, and, even if they know, they do not lightly disregard it. In any event, regardless of the number of people who act under compulsion of a State segregation statute which is unconstitutional and therefore unenforceable, certainly in the case of those who do respond to the compulsion the consequence is an implementation of the statutory command. The use of the State's criminal law to arrest and convict Negroes for activities which, except for unconstitutional State segregation statutes, would be entirely legal—because the restaurateur would not discriminate—is surely unconstitutional.

2. We have shown that, if a restaurateur excludes Negroes because of a State statute, the State cannot convict Negroes for trespass for entering the restau-

rant. In none of these cases, we recognize, does the record contain an express and specific affirmative showing that the coercive force of the segregation ordinance was the sole reason for the proprietor's refusal to serve the various petitioners. In *Peterson* the proprietor testified that he refused service because of local custom *and* the segregation ordinance of Greenville. In *Avent* the ordinance is not mentioned in the record, but the manager acted in accordance with local custom and for reasons of "public safety." The *Gober* case presents five pairs of convictions. Petitioners Gober and Davis were excluded because the proprietor felt that it would be against the law to serve them. The records in the four other trials in the *Gober* case do not record the motivation of the various proprietors.[39] In *Shuttlesworth*, the petitioners were convicted of aiding and abetting the violations of the trespass statute involved in the *Gober* case. Under Alabama law, as stated by the Alabama Court of Appeals in this case, the validity

[39] In the *Gober-Davis* trial, petitioners' attempt to secure further evidence concerning the relationship of the ordinance and the decision to discriminate was foreclosed by the rulings of the trial court that this line of inquiry was incompetent (see the Statement, *supra*, pp. 29–30). Since *Gober-Davis* was the first of a series of five trials before the same state trial judge, further efforts in the four later cases to raise the same issue would have been futile, as is shown by the court's ruling in *Parker-West* that a similar line of inquiry was impermissible. Thus, while no effort was made in the *Hutchinson-King*, *Sanders-Westmoreland*, or *Walker-Willis* trials to raise an issue concerning the segregation ordinance, it is fair to say that all the petitioners in *Gober* were denied an opportunity to show that the restaurateurs' decisions to discriminate were based on the Birmingham ordinance.

of the convictions depends on whether they were inciting persons to commit a crime. There is no evidence in the *Shuttlesworth* record as to the motivations of the proprietors of the establishments where the "sitting-in" occurred.

Upon each of these records the only permissible inference is that the local ordinance was such a substantial factor in the proprietor's decision that the State must share in the responsibility for the discrimination to the same extent as if the record showed that the decision of the restaurateurs to discriminate was based solely upon State law. It is not necessary that the discrimination be solely the result of the State's activities. It is enough that the State in any of its manifestations has become involved in the discrimination. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. See also pp. 59–63 *infra*.

We base our submission that the only permissible inference upon these records is one of substantial State responsibility for the proprietor's discrimination upon three lines of reasoning.

*First*, where State law requires racial segregation in all eating places and the proprietors uniformly comply, the average individual proprietor would never reach the question whether he would discriminate if left to a judgment uninfluenced by the State; and this seems true whether the owner is conscious or unconscious of the reasons for his conduct. The normal inference to be drawn from the existence of the ordinance, therefore, is that it caused the discrimination; and the State would then have to overcome the infer-

ence by showing that the decisions of the proprietors were wholly uninfluenced by the compulsion of an existing State law.

*Second,* to the extent that the records in these cases are unclear as to the motivation of the proprietors, the States had the burden of removing the ambiguity because the States themselves created it. It is a familiar principle of general applicability in our law that the party responsible for a wrong must "disentangle the consequences for which it was chargeable" or bear the responsibility for the whole. *National Labor Relations Board* v. *Remington Rand Inc.,* 94 F. 2d 862, 872. The question whether the restaurateurs were moved to act as they did because of the coercive effect of the segregation statutes would not exist except for the fact that the States passed and retained statutes which compel racial segregation and therefore violate the Fourteenth Amendment. It is clear, as we have seen, that if the proprietor discriminates as a result of the compulsion of the State, this constitutes State action. On the face of it, the decisions of the restaurateurs to discriminate were made under compulsion of explicit State statutes. Assuming that a State would be heard to deny the coercive effect of its own ordinance, there is no showing in any of these cases that the State did not cause the exclusionary act of the proprietor. In each instance, therefore, the State has failed to establish an element essential to the constitutionality of the conviction.

*Third,* even if the States had shown that the proprietor's decision to discriminate was not caused by the compulsion of the municipal ordinances, these

convictions would have to be deemed invalid because it was not also made to appear that the petitioners knew that the proprietor's decision was a purely private choice. Where discrimination appears on its face to be invalid under the Fourteenth Amendment because it is compelled by a State law, Negroes should not be required to investigate the true motive of the restaurateur before entering the premises. In *Boynton* v. *Virginia*, 364 U.S. 454, this Court held that the Interstate Commerce Act forbids racial segregation of a restaurant in a bus terminal. A contention was made that there was no proof that the bus company owned or controlled the bus terminal or restaurant in it. The Court answered that "where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers * * *, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination." *Id.* at 462–464. Thus, the Court held in *Boynton* that a Negro who is being discriminated against need not inquire into the precise facts when it appears that the discrimination violates the Interstate Commerce Act. It follows *a fortiori* that where, as in these cases, discrimination against Negroes on its face appears to violate the Fourteenth Amendment, the Negro need not ascertain the motives of the owner at the risk of suffering criminal sanctions.

If Negroes were required to ascertain the actual motives of the proprietors before seeking service at lunch counters or entering lunch rooms, their rights under the Fourteenth Amendment would be seriously abridged. These motives are frequently difficult, if not impossible, to ascertain, at the time the Negro desires service in a particular restaurant, especially when, as in most of these cases, chain stores are involved.[40] The situation is analogous to that in First Amendment cases where this Court has held that the State cannot pass statutes which, because of vagueness, or the burden of proof, or the lack of any requirement of scienter, have the indirect effect of discouraging freedom of speech even though in the particular case no protected right may have been invaded. *E.g., Smith* v. *California*, 361 U.S. 147; *Speiser* v. *Randall*, 357 U.S. 513; *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507; *Wieman* v. *Updegraff*, 344 U.S. 183. In these cases, too, the effect of the State convictions is to discourage the assertion of constitutional rights since the petitioners were not given notice of the facts necessary to determine whether their actions were constitutionally protected.

In the present cases it is unnecessary, we think, to go farther and consider whether the presumption that a State law requiring segregation in eating

[40] Negroes, it appears, are invited into these stores, and in other respects their trade is solicited on a non-discriminary basis.

places has played a significant part in the proprietor's decision can be overcome by testimony that the proprietor would have enforced segregation even if there were no current statute or ordinance. It can be argued with considerable force that a private person should not lose a power of choice which is otherwise his merely because the State or municipality has acted in an unconstitutional manner. We would submit, however, if the question had to be decided, that, whatever may be the right of a proprietor to assert in private litigation that his decision to segregate is the result of private choice rather than the State's command, the State cannot justify the prosecution as consistent with the Fourteenth Amendment upon the ground that its command directing segregation had no effective influence upon the proprietor, the police or the public prosecutor. In a criminal prosecution one cannot put the segregation statute or ordinance, the proprietor's decision and the prosecution for trespass in separate compartments. The order to segregate is too inconsistent with freedom of choice and the ways in which its existence may influence proprietors' decisions are too varied and too subtle to permit a State to defend a criminal prosecution which enforces racial segregation, upon the ground that the segregation resulted from private choice, unless the State has actually left both choices entirely open to proprietors.

The segregation ordinances are also related to petitioners' convictions for criminal trespass by another tie. The police normally exercise considerable dis-

cretion in their method of handling citizens' complaints about infractions of minor criminal laws such as the trespass statutes. Prosecutors have and exercise similar latitude in deciding whether to institute criminal proceedings; and the judge has wide discretion in his disposition of the case. A State which has current laws requiring racial segregation in public eating places interjects an official discriminatory bias into all these decisions which is certainly relevant in deciding whether a prosecution for criminal trespass is so closely related to the discriminatory ordinances as to be part and parcel of the same State denial of equal protection of the laws.

## II

ALTHOUGH IN THE LOUISIANA CASE THE STATE ADDRESSED NO EXPLICIT STATUTORY COMMAND TO RESTAURATEURS, AS SUCH, TO SEGREGATE THEIR CUSTOMERS, IT APPEARS THAT THE STATE, BY ITS POLICIES AND BY ITS LAWS IN CLOSELY RELATED AREAS, EFFECTIVELY INDUCED THE PROPRIETOR'S ACTS OF DISCRIMINATION. SINCE THE CASE DOES NOT PERMIT A FINDING THAT THE PROPRIETOR WAS MERELY MAKING A PRIVATE DECISION UNINFLUENCED BY OFFICIAL PRESSURE, THE STATE IS CONSTITUTIONALLY FORBIDDEN TO IMPOSE CRIMINAL SANCTIONS WHICH IMPLEMENT THE DISCRIMINATION.

A. The argument just concluded advances the proposition that when a State expresses its policy by issuing a specific statutory command to segregate it bears a heavy responsibility for discriminatory conduct which conforms to the State's requirement and cannot be permitted to compound the injustice by imposing criminal sanctions upon the victims of the

discrimination. The question presented in *Lombard* v. *Louisiana* is whether the same principle governs when the State's segregation policy is not embodied in an explicit statutory directive in terms requiring the proprietor of the particular establishment to discriminate against Negroes, but is, nonetheless, forcibly expressed and plainly evident in legislative declarations, laws in closely related areas, statements of public officials, and a long standing community-wide custom fostered and encouraged by the State.

We submit the same rule applies. For, in the absence of any contrary proof, in the latter case like the former it must be concluded that the exclusion of the Negro is the result of State policy rather than an unfettered individual decision. Notwithstanding the unsupported opinion of the Louisiana Supreme Court to the contrary (L. 146, 147, 148), an examination of the State and City policies and laws, together with the facts disclosed by the record, leads to the conclusion that Louisiana induced the acts of discrimination which support the prosecutions in *Lombard*; hence we submit these convictions are as invalid as those in the other cases.

To illustrate our point, we need go no further than the actual facts. Suppose, if you will, a State which, through its legislature, has proclaimed an overriding State policy of segregation; a State which, in pursuance of this policy, has enacted a panoply of prohibitions designed to inhibit contact between the races; a State which has vigorously and persistently enforced these prohibitions; a State which;

through the acts, conduct and statements of its public officials, has placed continuing stress upon the proposition that segregation is the required way of life; a State which, by the force of law and policy, brought to bear over the course of many decades and still continuing, has established a community-wide custom of segregation reaching virtually into every department of life. Suppose further that, though no specific enactment explicitly requires it, segregation is in fact uniformly practiced in public restaurants, in full conformity with the State's open and declared policies and with its encouragement and support. In these circumstances, does the absence of an express statutory command justify the conclusion that the State's prosecution of Negroes who seek to be served food despite the discriminatory practices followed by the proprietors of such an establishment is neutral and "color-blind"? Or, at least in the absence of a strong showing to the contrary, is one not driven, rather, to the conclusion that the State can not disclaim a measure of responsibility for the discrimination which it now seeks to implement through criminal sanctions?

Common sense requires an affirmative answer. Nor does this result call for the adoption of novel principles of law.

We begin with one certainty. The absence of an explicit statutory command does not foreclose the search for State action. The Fourteenth Amendment is not so narrowly confined. Just as the State acts in many other ways, so the Amendment looks

beyond the formal enactments of the State legislature. It notices State action in the rulings of judges, *Ex Parte Virginia*, 100 U.S. 339; *Shelley* v. *Kraemer*, 334 U.S. 1, in the edicts of governors, *Sterling* v. *Constantin*, 287 U.S. 378; *Cooper* v. *Aaron*, 358 U.S. 1; *Faubus* v. *Aaron*, 361 U.S. 197, affirming 173 F. Supp. 944, and in the decisions of all manner of subordinate local officials. *Virginia* v. *Rives*, 100 U.S. 313, 321; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278; *Niemotko* v. *Maryland*, 340 U.S. 268; *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230; *Cooper* v. *Aaron*, *supra*. And, as the cases just cited make plain, discrimination by State officers is no less prohibited because it is accomplished without, or despite, the command of statutory law. See *Monroe* v. *Pape*, 365 U.S. 167, 171–172.

But the Amendment does not reach "official" acts only. The State is not insulated merely because the result is accomplished through persons interposed, however, "private" they may claim to be. The State can no more dictate discrimination in private institutions than it can segregate its own facilities. *Truax* v. *Raich*, 239 U.S. 33; *Buchanan* v. *Warley*, 245 U.S. 60; *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707; *State Athletic Commission* v. *Dorsey*, 359 U.S. 533, affirming 168 F. Supp. 149; *Bailey* v. *Patterson*, 369 U.S. 31, 33; *Turner* v. *City of Memphis*, 369 U.S. 350. The constitutional right to equal treatment "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly * * *" *Cooper* v. *Aaron*, *supra*, 358 U.S. at 17. Nor is it only when the State

explicitly dictates discrimination by others that their conduct "may fairly be said to be that of the States." *Shelly* v. *Kraemer, supra,* 334 U.S. at 13. See *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461. State "participation", "whether attempted 'ingeniously or ingenuously,'" or "insinuation" in discriminatory activity is just as real when its involvment is "nonobvious." *Cooper* v. *Aaron, supra,* 358 U.S. at 4, 17; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. Cf. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451.[a] And, again, it does not matter through what branch of government, or whether formally or informally, the State encourages segregation by others. *Cooper* v. *Aaron, supra,* 358 U.S. at 17; *Terry* v. *Adams, supra,* 345 U.S. at 475 (opinion of Mr. Justice Frankfurter); *Barrows* v. *Jackson,* 346 U.S. 249, 254. As stated by this Court many years ago, "the prohibitions of the Fourteenth Amendment *,* * * have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes

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[a] See, also, *Muir* v. *Louisville Park Theatrical Association,* 347 U.S. 971, reversing and remanding 202 F. 2d 275; *Kerr* v. *Enoch Pratt Free Library of Baltimore City,* 149 F. 2d 212 (C.A. 4); *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (C.A. 4); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (C.A. 5); *Derrington* v. *Plummer,* 240 F. 2d 922 (C.A. 5); *City of Greensboro* v. *Simkins,* 246 F. 2d 425 (C.A. 4); *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5); *Lawrence* v. *Hancock,* 76 F. Supp. 1004 (S.D.W.Va.); *Jones* v. *Marva Theatres, Inc.,* 180 F. Supp. 49 (D.Md.); *Coke* v. *City of Atlanta, Ga.,* 184 F. Supp. 579 (N.D.Ga.). And see *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

that action may be taken." *Ex Parte Virginia, supra,* 100 U.S. at 346–347.

The cases just cited, although they do not resolve the present issue, show the breadth of the concept of State action, which, as Mr. Justice Clark pointed out in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721–722, has from the day of the *Civil Rights* cases until *Cooper* v. *Aaron* embraced "State action of every kind * * * which denies * * * the equal protection of the laws" (109 U.S. at 11) and also "state participation through any arrangement, management, funds or property" (358 U.S. at 4). So long as the State has meaningfully "place[d] its authority behind discriminatory treatment based solely on color [it] is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 727 (dissenting opinion of Mr. Justice Frankfurter).

In short, the State is not insulated from responsibility under the Fourteenth Amendment merely because a private person commits the final act of invidious discrimination. The question, as Mr. Justice Clark has pointed out for the Court, is whether the State in any of its manifestations has, to some significant extent, become involved in the discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722.

B. In light of these principles, we consider whether the act of discrimination which lies at the base of the prosecution of the petitioners in *Lombard* can be said to be "private", rather than State-induced.

1. The segregationist policy of Louisiana is reflected in its laws. The scheme is not haphazard. Almost every activity is segregated. Discrimination against the Negro literally begins with his birth and continues to his death, and beyond.

At the outset, the Negro is given a birth certificate which so identifies him. La. R.S. 40:244. He starts life on a segregated street. La. 33:5066–5068. See also, La. R.S. 33:4771. As a child he is segregated in parks, playgrounds, swimming pools, and other recreational activities. La. R.S. 33:4558.1. If taken to the circus, he must go in by a separate entrance. La. R.S. 4:5. Until very recently, he was relegated to all-Negro public schools. Former La. R.S. 17:331–334, 17:341–344 (repealed in 1960).[2] Even now, he may attend a segregated school in the upper grades. See *Orleans Parish School Board* v. *Bush*, August 6, 1962 (C.A. 5). Later on, he will be compelled to stay apart at all entertainments and athletic contests. La. R.S. 4:452. Mixed social functions are absolutely banned. La. R.S. 4:451. At work, he will eat separately and use separate sanitary facilities. La. R.S. 23:971–975. His voting registration is separately tabulated. La. R.S. 18:195. And, should he become a candidate for elective office, he will be identified by race on the ballot. La. R.S. 18:1174.1. He may not marry outside

[2] Despite the contrary rulings of the federal courts the statute books of Louisiana are not yet wiped clean of provisions designed to forestall effective desegregation of the public schools. See, *e.g.*, La. R.S. 17:107, 17:394.1, 17:395.1–4, 17:2801, *et seq.*, 17:2901, *et seq.*

of his race. La. Civil Code, Art. 94; La. R.S. 9:201. See, also, La. R.S. 14:79. If he is divorced, the court proceedings will reflect his color. La. R.S. 13.917, 13:1219.

Institutions for the blind and deaf are segregated. La. R.S. 17:10–12. So are homes for the aged and infirm. La. R.S. 46:181. And prisons also separate the races. La. R.S. 15:752, 15:854. See, also, La. R.S. 15:1011, 15:1031.

Finally, his death will be attested by a certificate identifying him by race. La. R.S. 40:246. And he will be buried, presumably in a segregated cemetery,[43] perhaps under a funeral policy which has been separately administered. La. R.S. 22:337; 22:345.

Significantly, in this pervasive scheme of segregation, there seems to be special emphasis on separate consumption of food and drink. Employers are required to segregate their employees during meals, even to the point of supplying different utensils for each race. La. R.S. 23:972. Likewise, at all places of public entertainment, separate water fountains must be provided. La. R.S. 4:452. And, in New Orleans at least, strict segregation is required in all establishments which serve beverages with more than one-half of 1 percent alcohol. New Orleans City Code, §§ 5–2(1), 5–61.1. All appearances suggest that the leg-

[43] While there appears to be no specific statute segregating cemeteries, the practice seems to be required, at least in all publicly owned cemeteries, by the recent constitutional provision compelling segregation in all State, parochial or municipal institutions. See La. Const. 1921, Art. X, § 5.1, as added by Act 630 of 1960, adopted November 8, 1960.

islative policy of Louisiana includes segregation of public restaurants and lunch counters.

The statute books give no false impression. While compulsory segregation is far from new in Louisiana, neither are the present laws mere vestiges of a forgotten past. Many of the statutes are recent. None are ignored as obsolete. On the contrary, what remained of a more generous era (see *Hall* v. *DeCuir*, 95 U.S. 485) was quickly erased from the books. One relevant example is the repeal in 1954, shortly after this Court's initial decision in *Brown* v. *Board of Education*, 347 U.S. 483, of the local "inkeeper" statute and a companion provision specifically banning "distinction or discrimination on account of race or color" in licensed "places of public resort." See former La. R.S. 4:3–4, repealed by Act 194 of 1954.

Where the State's segregation policy has given away, it has been almost invariably under the compulsion of federal court orders, and then only after most protracted litigation. See *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986 (E.D. La.), affirmed, 340 U.S. 909 (State law school); *Tureaud* v. *Board of Supervisors*, 116 F. Supp. 248 (E.D. La.), reversed, 207 F. 2d 807, judgment of court of appeals stayed, 346 U.S. 881, vacated and remanded, 347 U.S. 971, affirmed, 225 F. 2d 434, reversed and remanded on rehearing, 226 F 2d 714, affirmed on further rehearing *en banc*, 228 F. 2d 895, certiorari denied, 351 U.S. 924 (State undergraduate and law school); *Morrison* v. *Davis*, 252 F. 2d 102 (C.A. 5), certiorari

denied, 356 U.S. 968, rehearing denied, 357 U.S. 944 (Buses and streetcars); *New Orleans City Park Improvement Ass'n* v. *Detiege*, 252 F. 2d 122 (C.A. 5), affirmed, 358 U.S. 54 (Municipal park); *Ludley* v. *Board of Supervisors of L.S.U.*, 150 F. Supp. 900 (E.D. La.), affirmed, 252 F. 2d 372, certiorari denied, 358 U.S. 819 (State colleges); *Dorsey* v. *State Athletic Commission*, 168 F. Supp. 149 (E.D. La.), affirmed, 359 U.S. 533 (Interracial sports contests); *Board of Supervisors of Louisiana State U.* v. *Fleming*, 265 F. 2d 736 (C.A. 5); (State university); *Louisiana State Board of Education* v. *Allen*, 287 F. 2d 32 (C.A. 5), certiorari denied, 368 U.S. 830 (State trade school); *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376 (C.A. 5), certiorari denied, 368 U.S. 830, further relief granted, 197 F. Supp. 649, affirmed, 368 U.S. 515 (Public schools); *East Baton Rouge Parish School Board* v. *Davis*, 287 F. 2d 380 (C.A. 5), certiorari denied, 368 U.S. 831 (Public schools). This Court is, of course, familiar with the course of the litigation involving the public schools of New Orleans. See *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 337 (E.D. La.), leave to file mandamus denied, 351 U.S. 948, affirmed, 242 F. 2d 156, certiorari denied, 354 U.S. 921, denial of motion to vacate affirmed, 252 F. 2d 253, certiorari denied, 356 U.S. 969, further motion to vacate denied, 163 F. Supp. 701, affirmed, 268 F. 2d 78; *id.*, 187 F. Supp. 42, stay denied, 364 U.S. 803, affirmed, 365 U.S. 569; *id.*, 188 F. Supp. 916, stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *id.*, 190 F. Supp. 861, affirmed,

366 U.S. 212; *id.*, 191 F. Supp. 871, affirmed, 367 U.S. 908; *id.*, 194 F. Supp. 182, affirmed, 367 U.S. 907, 368 U.S. 11; *id.*, 204 F. Supp., 568, modified, 205 F. Supp. 893, modified and affirmed (C.A. 5), August 6, 1962.

As the State Legislature recently proclaimed, not only has Louisiana "always maintained a policy of segregation of the races," but "it is the intention of the citizens of this sovereign state that such a policy be continued." La. Act 630 of 1960, Preamble.

2. The statute books tell only a part of the story. Louisiana has a long tradition of racial discrimination, as is attested by the cases which have reached this Court. See, in addition to the cases already cited and those cited, *infra*, p. 70, *United States* v. *Cruikshank*, 92 U.S. 542; *Plessy* v. *Ferguson*, 163 U.S. 537; *Harmon* v. *Tyler*, 273 U.S. 668;[1] *Pierre* v. *Louisiana*, 306 U.S. 354; *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293. Even in areas where there is no specific statute, the custom of segregation persists. And, of course, customs often have a force akin to law. *Civil Rights Cases*, 109 U.S. 3, 16, 21; *Terry* v. *Adams*,

[1] "Louisiana's reluctance to abandon its tradition of segregation, even where this Court has ruled, is exemplified by the retention of the provision banning mixed communities in the 1950 codification of the laws still in effect, long after this Court's declaration that the statute was unconstitutional in *Harmon* v. *Tyler*. The Reporter for the revision notes that, since "[t]he state supreme court in its opinion [upholding the statute] had carefully distinguished or attempted to distinguish, the *Buchanan* case [*Buchanan* v. *Warley*, 245 U.S. 60, relied on by this Court]," and since this Court's ruling was "only a memorandum decision," the provision should be retained as still in force. See "Reporter's Notes" to La. R.S. 33:5066.

*supra*, 345 U.S. at 475 (opinion of Mr. Justice Frankfurter). Indeed, the Louisiana criminal courts are expressly enjoined to take judicial notice of extra-legal racial customs, presumably because they have legal relevance. See La. R.S. 15:422(6).

Specifically, a strict practice of segregation prevails in the service of food. As Mr. Justice Douglas noted in *Garner* v. *Louisiana*, 368 U.S. 157, 181 (concurring opinion):

> Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. * * *.

The custom had not changed when the present "sit-in" occurred. Both the Mayor and Police Superintendent of New Orleans frankly stated that they knew of no desegregated restaurant in the City.[45]

But segregation in restaurants is no mere *private* custom. If it were, it would doubtless have long since ceased to be the uniform practice. See *Cooper* v.

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[45] We understand that since the granting of the petition in *Lombard* several department stores in New Orleans have desegregated their lunch counters. Of course, the partial desegregation of eating establishments at the present time does not disclose the situation when the discrimination at the base of these prosecutions occurred, two years earlier.

*Aaron, supra,* 358 U.S. at 20–21, 25, 26 (concurring opinion of Mr. Justice Frankfurter). It is actively supported by the outspoken policies of the State—policies so hardened that State employees are enjoined from advocating integration under penalty of losing their jobs. See La. R.S. 17:443, 17:462, 17:493, 17:523.

The State itself, apart from the enactment of compulsory legislation, sets the example. It segregates all of its own facilities. La. Const. 1921, Art. X, as amended 1960, § 5.1. It continues to discriminate in the electoral process. See *United States* v. *McElveen,* 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas,* 362 U.S. 58; *United States* v. *Association of Citizens Councils of Louisiana,* 196 F. Supp. 908 (W.D. La.); *United States* v. *Manning,* 205 F. Supp. 172 (W.D. La.). See, also, *Hannah* v. *Larche,* 363 U.S. 420. Despite decisions in this Court, beginning with *Strauder* v. *West Virginia,* 100 U.S. 303, discrimination in grand jury selection persisted in New Orleans until at least 1954. See *Eubanks* v. *Louisiana,* 356 U.S. 584, 586. See, also, *Poret* v. *Sigler,* 361 U.S. 375. And efforts by Negroes to challenge segregation customs have been promptly met with prosecutions for breach of the peace. *Garner* v. *Louisiana,* 368 U.S. 157 (lunch counter customarily reserved for whites); *Taylor* v. *Louisiana,* 370 U.S. 154 (terminal waiting room customarily reserved for whites).

3. As indicated above, the inference that the State government causes and sustains the practice of segre-

gation in Louisiana restaurants seems unavoidable. In this instance, there were additional pressures by local officials.

Although the former New Orleans Mayor and the Superintendent of Police are men of moderation, whose utterances were restrained, their statements, quoted in full at pp. 12–15, *supra*, could not but harden the opposition to desegregation of lunch counters in the City. The timing of these official declarations was crucial.

It appears that, one week prior to the "sit-ins" here involved, the Superintendent of Police issued a public statement (*supra*, pp. 12–13), reprinted in the city's leading newspaper, which, in the context of Louisiana's laws and customs, must have been understood to condemn the efforts of the city's Negro citizens to achieve equality of treatment at lunch counter facilities not only by demonstrations but by any means. Terming the first "sit-ins" to have occurred in New Orleans "regrettable," the Superintendent claimed they were instigated by a "very small group" which did "not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population." The Superintendent appealed to "mature responsible citizens of both races" to "exercise * * * sound, individual judgment, goodwill and a sense of personal and community responsibility." Parents of the demonstrators were asked "to urge upon these young people that such actions are not in the community interest." Perhaps most significant, the Superintend-

ent saw "no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans." In the existing environment this exhortation can hardly have been understood to be confined to illegal demonstrations; it obviously supported the notion that proprietors should continue to refuse service to Negroes, for the normal traditional pattern of race relations with respect to food service, as the Mayor and Superintendent testified, was that proprietors would not serve Negroes on an integrated basis.

Four days prior to the "sit-ins," the Superintendent's statement was buttressed by a statement issued by the Mayor (*supra*, pp. 13–15) also published in the press. The Mayor declared that he had "directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted." This command was not restricted to demonstrations involving refusals to leave after being requested to do so. It acknowledged no room for free private decisions by the owners of lunch counters, no opportunity for Negroes to seek service in the hope that the owners would abandon segregation. It was also a direct prohibition upon lawful peaceful picketing (Cf. *Thornhill* v. *Alabama*, 310 U.S. 88) designed to encourage proprietors to serve Negroes on an integrated basis. The Mayor stated that he would enforce his directions by invoking two recent enactments of the State legislature prohibiting acts which could "foreseeably disturb or alarm the

public." Finally, he demanded that "such demonstrations cease" in the "community interest."

The foregoing statements read in isolation might fairly be construed to deal only with "sit-in" demonstrations. However, their combined effect in the Louisiana context, we submit, was not only to discourage "sit-ins" but to condemn the goal of equality of service and any activity intended to persuade the proprietors of public eating-places to cease segregation. Their impact upon those who might otherwise have acceded to the demands for equality of treatment seems plain.

4. We return to the question whether the total body of State influences—the manifold current segregation laws and contemporaneous declarations of policy, the customs stemming therefrom and the declarations of the mayor and chief of police—should be found to have played the same decisive role in the proprietors' discrimination against petitioners Lombard *et al.* as the municipal ordinances were seen to play in the companion cases previously discussed. See pp. 50–59 *supra*. The situations differ in that the Louisiana laws did not literally require the segregation. They are the same in that on this record one can only conclude that Louisiana's official actions must have been effective inducing causes of the proprietor's choice. Under these circumstances, too, normal human experience teaches that the individual proprietor would never face the problem of forming a judgment uninfluenced by State policy. The State which enacts unconstitutionally discriminatory laws in areas so

closely related to segregation in public eating-places and which declares generally that racial segregation is the policy of the State has the same burden of disentangling its influence upon the proprietors' discrimination from other factors for which the State is not responsible. And there is the same burden to show petitioners' awareness that the segregation was the result of the proprietor's individual choice uninfluenced by State action, if indeed that were the truth.

In the present case, we are not left merely to inference and presumption. Far from overcoming the conclusion that the exclusionary practice stemmed from the State, the testimony of the store manager confirmed it. Although his testimony on this subject was curtailed at the trial (see *supra*, pp. 17–19), the manager pointedly declared (*supra*, pp. 16–17) that he refused petitioners service because of "local tradition, law and custom."

Louisiana's official segregation policies are also related to petitioners' convictions for criminal trespass by their inevitable effect upon the police, the prosecutors and the State courts. Louisiana's policy, like the segregation-in-public-eating-places ordinances discussed at pages 49–59 *supra*, interjected an official discriminatory bias into the decisions of the police in the handling of complaints, into the decision of the prosecutor as to whether to institute criminal proceedings and, quite possibly, into the sentence. This impact of the segregation policies in the criminal proceeding confirms our conclusion that the convictions violate

the Fourteenth Amendment because on these records they are inseparably part of the official State policy of denying Negroes equal protection of the laws.

In the present case, it is unnecessary to consider just how large a body of State laws would justify finding, in the absence of contrary proof, that the State is so involved in the proprietor's decision that it is barred from initiating a prosecution for criminal trespass. Each particular case must be individually decided by making a judgment upon the question of degree, and the smaller the body of State law the closer the case will fall to the dividing line. In the *Lombard* case the Louisiana statutes are current and the general State policy of segregation was declared by the legislature as recently as 1960. The problem that would arise if the statutes had been repealed and the private discrimination were only the result of community customs promoted by earlier State laws does not require consideration here. The currency and pervasiveness of the body of Louisiana's segregation laws and the plainness with which that policy is declared show that this case is well on the unconstitutional side of the dividing line.

5. We have argued above that the record utterly fails to overcome the strong inference that the proprietor's acts of discrimination were brought about by the State. Although the Louisiana Supreme Court has stated in its opinion (L. 147) that the decision to exclude Negroes was independently made by the store owner, we find no supporting evidence for this conclusion. The manager did testify that, so far as the

national chain was concerned, the determination was left to him. And, obviously, it was he who actually established the segregated eating accommodations and maintained them separate. But the courts below gloss over the manager's explanation why he acted as he did. So far as he was permitted to explain, he said he was following prevailing "local tradition, law and custom," as he interpreted it. Further cross-examination on this point was cut off. Clearly, this statement does not support the conclusion that he made a purely private decision.

We think this evidence unambiguous against the background already sketched. For, as we have said, having intruded so actively and so pervasively in the area of race relations, the State had to overcome the presumption that it participated in the act of discrimination at the base of these prosecutions. And, certainly, Louisiana has not met that burden, at the trial or elsewhere. But the result here would not be different if the Court should disagree and hold that the shoe was on the other foot. For, if petitioners bore the burden of proving the State's involvement, they were at least entitled to an opportunity to make that showing. And, if they have failed to satisfy this Court, it is only because their efforts in this direction were summarily cut short.

As the court below confirms, petitioners "sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers * * *" (L. 146). But the trial court refused that evidence. To cite one example, during the questioning of the store manager,

petitioners' counsel asked: "Will you tell the court why you were not allowed to serve them?" (L. 109). After an objection by the prosecutor was sustained on the ground that the question was not material, defense counsel stated the purpose of his inquiry (L. 110):

> I think it is material, because if Mr. Graves [the restaurant manager] felt there was some State policy that prevented him from serving these defendants this is a clear state action. * * *

Nor is this an isolated instance. Consistently, during the preliminary hearing on the motion to quash and during the trial itself, the trial judge prevented inquiry as to why the restaurant discriminated (L. 23, 25, 26, 107, 108, 127–128). The court having imposed upon them the burden of proving the State's involvement, this curtailment of petitioners' attempt to show that the store's decision to discriminate was attributable to the State was clearly improper. It follows that the *Lombard* convictions would have to be reversed even if the burden of showing whether the State's active support of segregation actually influenced the proprietor was upon the petitioners rather than the State.

## III

### THE DECISION IN THESE CASES SHOULD NOT BE DETERMINED BY CONSIDERATIONS PERTINENT SOLELY TO RIGHTS AS BETWEEN THE PROPRIETORS AND PETITIONERS

We have considered thus far the issues as between the petitioners and the States, and have shown that upon these records it must be concluded that the

States were sufficiently responsible for the discrimination to make their total action in relation to the petitioners' sentences—the inducement to discriminate plus the prosecution, conviction and sentences—a denial of equal protection of the law. In other words, a State may not, consistently with the Fourteenth Amendment, both induce a proprietor to engage in racial discrimination and prosecute the victims for criminal trespass or a similar offense.

The question may be raised, what are the mutual rights and duties of the petitioners and proprietors in the context of an ordinance requiring, or State action strongly encouraging, racial segregation. It may be argued, in attack upon our position, that reversal upon the grounds we urge would require holding the proprietors to a duty to serve Negroes and denying them private right to exclude them for whatever personal reasons they chose, a result inconsistent with the preservation of the private freedom of choice, sustained in the *Civil Rights Cases* and our ensuing constitutional history. The Negroes' remedy, the argument would conclude, is by direct attack upon the unconstitutional ordinances and official segregation policies rather than the proprietors' private freedom to discriminate.

We believe that this line of inquiry need not be fully explored because a decision in the present cases upon the ground put forward in this brief need not determine the private rights as between proprietors of public eating places and Negroes seeking service.

In the first place, there is no need to decide here whether even a criminal prosecution would violate the Fourteenth Amendment if it were made to appear as a fact that the proprietor's discriminatory practice was not a result of State action but of a personal wish to discriminate which would have been indulged in the absence of the State laws. On the records before the Court, this is not the fact. Obviously, the decision, then, cannot affect rights in private litigation in which the fact is made to appear.

Second, the presumption that the State law has influenced the private decision—a presumption which operates against the State in a criminal prosecution—might not operate in the same fashion against the private owner. The State, having adopted unconstitutional segregation laws, has a duty to disentangle the consequences; it does not lie in the State's mouth, at least in the absence of clear proof, to say that the very discriminatory practices that it ordered or otherwise sought to induce were actually unrelated to the State's directions or encouragement. This reasoning, however, would not run against the individual proprietor and consequently, as between him and the Negro, the outcome of any litigation might be different.

Third, we submit that there is no reason, in the circumstances of these cases, why the ability of the State to prosecute must be exactly the same, both substantively and procedurally, as the right of private owners to refuse service and exclude the Negro who

insists upon service. It is one thing to say that a State which enacts a law requiring segregation in public eating places is guilty of denying Negroes equal protection of the laws not only when it enforces that statute against them, but also when it prosecutes them for criminal trespass because of the decision of those who are apparently obeying the statutory command. That conclusion follows because the segregation laws cannot be so rigidly separated from the criminal prosecution; the prosecution, at least until the contrary is clearly demonstrated, is not only State action but a consequence, and therefore part and parcel, of the concurrent denial of equal protection of the laws. It is quite a different thing, however, to deprive the owner of any property rights which he may independently wish to exercise, on the ground that the State has violated the Fourteenth Amendment. Because of this difference the disposition of these criminal cases need not affect the private rights of proprietors and those seeking restaurant service, and those rights would remain to be determined whenever the issue may arise.

Under the facts of these cases, there is no serious incongruity in suggesting that the proprietors have not necessarily lost their right of action or defense in private suits merely because the State is constitutionally barred from implementing their discrimination through the imposition of criminal sanctions. The problem, if any, is confined within a narrow compass, and it is curable. We espouse no broad

rule of constitutional law which would, in all cases, deny the storeowner who wished to discriminate among customers the aid of the State criminal law. That might be the result if it were held that a State violates the Fourteenth Amendment merely by arresting and prosecuting those who trespass upon segregated premises. But we present no such question. Our contention is that, in cases like those at bar, the arrests and prosecutions violate the Constitution because the State itself has been a party to the underlying discrimination. To regain its neutrality and remove the only barrier now urged against its action, it suffices if the State terminates its objectionable inducement of discriminatory practices.

In summary, we submit that when the State, by its current laws, actions, and policies, brings about individual acts of discrimination in the conduct of a business open to the public at large, it cannot impose criminal sanctions upon those who have been excluded, on the theory that it is merely implementing a private property right. Americans, both black and white, may stand upon a more fundamental right: The right that government shall deny to no man the equal protection of the laws.

## CONCLUSION

For the foregoing reasons, the judgments of conviction in these cases should be reversed.

Respectfully submitted.

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